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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Civ. No. 1948. Third Appellate District.—February 18, 1919.]

ALICE K. MURPHY, Respondent, v. WM. H. RIECKS, as Sheriff, etc., Defendant; LULU MIGNON MURPHY, Appellant.

- [1] JUDGMENT FOR MAINTENANCE—LIEN ON REAL PROPERTY.—A judgment in an action for maintenance and support limited to exist in its operative effect to a specified time becomes *functus officio* at the expiration of that time, and ceases to be a lien upon the real property of the defendant.
- [2] ID.—INJUNCTION—RESTRAINING SALE OF REAL PROPERTY BY EXECUTION.—Where a wife is the owner of the legal title to real property by deed of gift from her husband, and is in possession thereof and her title has been established as perfectly valid by a solemn judgment, in an action wherein its validity was directly challenged, an injunction will lie at her instance to restrain a sale of the property under an execution issued on a judgment against the husband in favor of the daughter of the husband and wife for the support and maintenance of the daughter.

APPEAL from a judgment of the Superior Court of San Joaquin County. W. H. Langdon, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Lulu Mignon Murphy, *in pro. per.*, and Walter F. Lynch for Appellant.

John R. Cronin for Respondent.

HART, J.—The appeal is by defendant, Lulu Mignon Murphy, from a judgment, entered in the superior court of the county of San Joaquin, restraining defendants from selling, by virtue of a certain writ of execution, at sheriff's sale or otherwise, certain real property of plaintiff.

The defendant, Riecks, as sheriff, filed an answer and disclaimer and upon the trial was permitted to withdraw from the case. The real parties to the action, therefore, are the plaintiff and Lulu Mignon Murphy, who will hereinafter be referred to as the defendant and appellant.

Prior to the thirteenth day of October, 1908, S. S. Murphy was the owner of the property sought to be sold by virtue of said writ of execution. On said day, by deed of gift, he conveyed said property to his wife, Alice K. Murphy, plaintiff herein, which deed was duly recorded on August 5, 1911, since which time the property has stood in the name of plaintiff.

Appellant is the daughter of said S. S. Murphy by a former wife. On the thirteenth day of March, 1911, she instituted an action (No. 9896) against her father. It was alleged in the complaint that plaintiff was a poor person, afflicted with disease and unable to work to support herself; that she had frequently demanded of her father that he maintain and support her and that he was financially able to contribute to her support. The demand was for \$30 per month, commencing July 15, 1896, and for attorney's fees and costs. The defendant in said action filed an answer and, on the twenty-sixth day of April, 1911, a partial hearing was had, and the defendant, upon agreement and stipulation of the parties, was awarded an allowance of \$18 per month, payment of which was to begin on the 29th of said month of April and to continue and to be made on the twenty-sixth day of each and every month thereafter, until the second day of January, 1912. Thereupon, and upon the agreement between counsel for the respective parties and the announcement in open court that "the interests of the parties might best be served by continuing the further hearing of said matter until Tuesday, the second day of January, 1912," the matter was continued by the court for further hearing to said date. On March 21, 1912, another hearing was had and judgment was entered in favor of plaintiff in said action (defendant herein), directing defendant in said action to pay her the

sum of \$15 per month from January 5, 1912. In this connection, it should be stated that the trial court in this action, in its findings, refers to and treats its judgment of January 5, 1912, as a modification of the order or judgment of April 26, 1911. In other words, the phraseology of the recitals in the judgment or order of April 26, 1911, awarding the defendant here a monthly allowance of \$18 for a specified limited period, seems to indicate that the matter was not on that date fully heard, and that the allowance awarded defendant in this action was intended as more in the nature of a *pendente lite* provision than as a final judgment, but the theory of the findings herein is that the original award was in the form of a judgment and that the later or final judgment was a modification of the former.

However, on the twenty-third day of June, 1913, defendant and appellant brought an action (No. 10,814) against her father and stepmother. In the third amended complaint therein, filed September 11, 1915, the judgment in said action No. 9896 was set out, and it was alleged: That the same is still in full force and effect; that S. S. Murphy has disposed of all the property which was recorded in his name at the time of the filing of the complaint and the rendering of the judgment in said action, and that there is now no property standing in his name on the records of the county of San Joaquin; that for more than two years said S. S. Murphy "has lived in defiance of said plaintiff's afore described judgment against him and has paid said plaintiff no money at all . . . and refuses to comply with the said judgment." It was alleged that "plaintiff believes, alleges, and affirms" that said transfer by said S. S. Murphy to Alice K. Murphy of the afore-said real estate was made "for the purpose of placing all properties in the name of his said wife and thereby to endeavor to evade the payment of the afore described judgment of court and to defraud said plaintiff out of the income awarded her for her maintenance and support"; that said transfer by S. S. Murphy to his wife "was not made and recorded in good faith or for any legal purpose whatsoever, but . . . for the purpose of defrauding said plaintiff out of the afore described judgment of court and out of the income awarded said plaintiff." The complaint prayed that said deed of gift be declared fraudulent as against plaintiff and that the same be stricken from the records of said county.

Issue was joined by answer and the court found: That the deed of gift was not made to defraud plaintiff but was made in good faith; that said deed was delivered to Alice K. Murphy on the 13th of October, 1908, since which date said property "has been the exclusive property of said Alice K. Murphy." Judgment was accordingly entered in favor of defendants in said action. No appeal was taken from said judgment.

S. S. Murphy complied with the terms of the judgment in action No. 9896 until May 5, 1914, when he ceased making payments. On December 5, 1916, execution was issued to recover the sum of \$465, then due, and the sheriff levied upon the property conveyed by said deed of gift. Alice K. Murphy served upon the sheriff a "third party claim" in which she notified him that she was the owner of the property levied upon and demanded its release.

On the 12th of January, 1917, the present action (No. 12,336) was commenced by Alice K. Murphy against the sheriff and Lulu Mignon Murphy. The complaint alleged: "That S. S. Murphy has no right, title, interest, or claim in said real property," describing it; that the writ of execution referred to required the sheriff to make good "certain sums therein specified out of the personal or real property of S. S. Murphy"; that by virtue of said writ of execution the sheriff has levied upon real property of the plaintiff and is about to sell the same; that, on the third day of January, 1917, the plaintiff served on the defendant, sheriff, "her verified claim to said real property . . . and a demand that said real property be surrendered to said plaintiff," which demand was by the sheriff refused. It was then alleged that said writ of execution was issued in said case No. 9896 and reference is made to the judgment therein obtained. The execution, delivery, and recordation of said deed of gift are alleged. Reference is made to action No. 10,814 and the judgment therein rendered decreeing that the property in question is the separate property of plaintiff. "That the defendant, Lulu Mignon Murphy, holds no judgment against this plaintiff," and that she is well aware that the property stands in the name of plaintiff and that S. S. Murphy has no right, title, interest, or claim therein. The prayer was for an order restraining the sheriff from selling said property.

The answer of defendant denied plaintiff's ownership of the property; alleged that, on April 10, 1911, and on April 14, 1911, S. S. Murphy, in his answer in action No. 9896, admitted ownership of said property; alleged that S. S. Murphy has interest in said property "to the extent of the aforesaid judgment"; that the deed of gift is void as against the judgment secured against S. S. Murphy. "Affirms that said plaintiff by neglecting and failing to record said described and alleged deed of gift, prior to said commencement of said action No. 9896, has waived all right to priority over the judgment in said case," and has waived all right to interfere with the execution; that the judgment in action No. 9896 became a lien on the property prior to the recording of the deed of gift.

On January 15, 1917, a temporary restraining order was issued and served upon the sheriff. The action was tried on April 10, 1917, findings were filed in favor of plaintiff and judgment was entered on May 21, 1917, enjoining defendants from selling plaintiff's property.

[1] We think that the theory of the findings in this action that the judgment of March 21, 1912, involved a modification of the said judgment or order of the twenty-sixth day of April, 1911, awarding the plaintiff in said proceeding (defendant herein) the sum of \$18 per month until the second day of January, 1912, is not sustainable. The two judgments are entirely distinct from each other. The first was limited to exist, in its operative effect, to a certain specified time, and when the time to which it was so limited lapsed, which was prior to the rendition and the entry of the second judgment, it became *functus officio*, and assuming that by virtue thereof a lien attached to the premises conveyed by S. S. Murphy, in October, 1908, to the plaintiff herein, the grant not having been recorded until after said judgment was entered, then said lien passed out contemporaneously with the passing out of said judgment, it appearing that the same was fully satisfied by said S. S. Murphy. It follows that, since the conveyance from S. S. Murphy to the plaintiff herein was of record at the time of the rendition and entry of the second judgment, no lien by reason of said second judgment could attach to the said premises.

As to the charge in the answer herein that the conveyance from S. S. Murphy to the plaintiff herein was fraudulent and

made for the purpose of preventing the satisfaction of the judgment herein out of the property so conveyed, the ready reply thereto is to be found in the finding and in the evidence that, in an action instituted by the defendant here in September, 1915, and subsequent to the entry of the second judgment awarding her a monthly allowance for support against her father, S. S. Murphy, the issue as to the alleged fraudulent transfer of the premises involved herein by S. S. Murphy to the plaintiff herein was made by the pleadings, and upon the trial thereof the court found and decided that the charge of fraud in said transaction was without foundation. As seen, no appeal was taken from the judgment in said action, and the finding or decision in said action that said conveyance was not fraudulent or made with intent to defraud the defendant of the fruits of her judgment against her father for maintenance and support is conclusive upon that issue as against her.

The claim is made that injunction is not the proper remedy in such a case as this. The contention possesses no force. It is thoroughly settled that a sale of lands upon an execution issued against the grantor of the person holding the legal title will cast a cloud upon the title (*Einstein v. Bank of California*, 137 Cal. 47, 49, [69 Pac. 616]; *High on Injunctions*, 3d ed., sec. 379; 3 *Freeman on Executions*, 3d ed., sec. 438; *Pixley v. Huggins*, 15 Cal. 133), and it is equally well settled that a sale will be enjoined where its effect will be to cloud the title of the party complaining. (*High on Injunctions*, sec. 372; *Shattuck v. Carson*, 2 Cal. 588; *Pixley v. Huggins*, 15 Cal. 128; *Culver v. Rogers*, 28 Cal. 520; *Porter v. Pico*, 55 Cal. 175; *Porter v. Jennings*, 89 Cal. 440, [26 Pac. 965]; *Einstein v. Bank of California*, 137 Cal. 47, 49, [69 Pac. 616].)

[2] The plaintiff was the owner of the legal title to the property involved herein and in possession thereof. Her title to the property was not only presumptively good but established to be perfectly valid by a solemn judgment of a court of competent jurisdiction in an action wherein the validity of her title was directly challenged. The sale of the property by the sheriff under the execution issued against the property for the satisfaction of a judgment against her husband, although insufficient to vest title in the purchaser at the execution sale, would, nevertheless, be sufficient to enshroud the validity of her title in a veil of doubt and thus cast a cloud

upon it. We can imagine no case where the injunctive or preventive function of courts of equity could the more justly or appropriately be called into action than in a case where, as here, there was about to be consummated a proceeding, bearing upon its face the insignia of judicial authority, which would, if carried out, involve the validity of a person's title to land in doubt. Certainly it would be a very weak system of remedial justice that would require the owner of the land to stand helpless and mute until after the threatened mischief to his title had been committed, and we know of no other remedy afforded either by the law or by the equity courts than that of the writ of injunction which would prevent the commission of so grievous a mischief upon and against the title to real property.

It is perfectly clear that there is no other possible alternative open to this court but to affirm the judgment, although we are frank to say that, so far as we are informed by the record before us of the facts of the controversy giving rise to this litigation, the appellant is entitled to receive assistance from her parents, if they are financially able to render such assistance, in the matter of her maintenance and support. Indeed, such assistance should be provided, not as the result of the coercive power of the law, as it has been written by man, but in ready response to the dictates of the very first and commonest principles of humanity. It is, of course, the legal duty of S. S. Murphy to support the appellant, if for any substantial reason she is unable to support herself and he has ample means for doing so, but, above all, is that natural duty intrinsically reciprocal as between parent and child, involving obligations which should be held none the less sacred and morally binding because in some measure formally recognized by positive law. It is to be deprecated that some substantial relief cannot be afforded the appellant through the processes of the courts, if it be true that under the circumstances of her case no such relief be available to her, assuming, of course, that she is for any reason without ability to maintain herself and that her father is. But the law, both substantive and remedial, must be applied according to a well-defined plan to secure that uniformity of operation so necessary to a well-poised system of jurisprudence, and the courts can do no more or no less than to administer the first

in the manner prescribed by the latter. Thus we speak, not alone because we see justness in the claim of the appellant that she is entitled to assistance from her parents, but also because, although not a licensed practitioner of the law and undoubtedly without training therein, it appears that she has been required, probably from paucity of means to employ the services of an attorney, to appear in this cause before this court *in propria persona* and so present her own side of this controversy. She has filed herein a voluminous brief, prepared, as we are informed, by herself, unaided by a lawyer, and while therein, for one who has not been an habitual student of the law, she has presented her side of this case with singular clearness and force, it is plainly manifest that (as above declared), so far as this particular case is concerned, the law is against her, and, therefore, her appeal cannot be sustained.

The judgment is accordingly affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 17, 1919.

All the Justices concurred.

[Civ. No. 2490. Second Appellate District, Division One.—February 18, 1919.]

J. W. COOMBS, Appellant, v. JAMES H. BURK, Respondent.

[1] CONTRACT—VOID AGREEMENT—SALE OF GAS APPLIANCES—FURNISHING GAS—RESTRAINT OF TRADE—PUBLIC POLICY.—A contract, under which a gas corporation, furnishing gas to a city and its inhabitants, agreed to install for a private consumer certain appliances and piping, in consideration of which the consumer agreed to purchase from the gas corporation all gas which he might use, and in case of his failure to do so, and the purchase by him of gas from any other company, to pay to the contracting company a fixed sum in settlement for the articles installed, was illegal and contrary to public policy, as it was not only in restraint of trade, but if upheld

would tend to stifle competition and give the contracting gas company a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare.

APPEAL from a judgment of the Superior Court of Los Angeles County. Edgar G. Pratt, Judge *pro tem.* Affirmed.

The facts are stated in the opinion of the court.

H. C. Beach and S. W. Guthrie for Appellant.

Hibbard & Kleindienst for Respondent.

SHAW, J.—Action by plaintiff, as assignee of Los Angeles Gas & Electric Corporation, to recover money upon a contract. At the trial defendant interposed an objection to the reception of any evidence on the part of plaintiff upon the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it appeared therefrom that the contract made the basis of the action was illegal and contrary to public policy. This objection was sustained and judgment entered for defendant, from which plaintiff appeals.

[1] It appears from the complaint, wherein the document is set out in full, that on June 1, 1916, the Los Angeles Gas & Electric Corporation (hereinafter designated the Gas Corporation), then engaged in furnishing a supply of gas to the city of Los Angeles and its inhabitants, entered into a contract with defendant whereby, for one dollar and the covenants therein contained on the part of defendant, it agreed to furnish and install for his use in said city, three No. 124 waffle irons, three three-burner hot plates, one Eclipse hotel range, three three-burner arcs, four single reflex lights, and 266 feet of pipe; in consideration of which defendant, during the life of the agreement, agreed to purchase from said Gas Corporation all gas which defendant might use, for any purpose at the place where said articles were installed, and in case of his failure so to do and the purchase of gas from any other person, concern, or corporation, he would pay to the Gas Corporation \$330 in settlement for the articles so installed; provided, however, that if he ceased to occupy the premises or permanently discontinued the use of gas at said address, the agreement should terminate upon his returning the property (title to which until paid for should remain in

the vendor), so installed, in good repair and condition, reasonable wear excepted. The contract further provided that upon defendant's failure to purchase his supply of gas from the Gas Corporation, the \$330 should become immediately due and payable. It is alleged that on the fourth day of August, 1916, defendant, without any fault on the part of the Gas Corporation, discontinued using the gas of said corporation and purchased gas from another company supplying gas in said city of Los Angeles, in violation of said agreement. "Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful." (Greenhood on Public Policy, p. 180.) Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. (*Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, [32 L. Ed. 979, 9 Sup. Ct. Rep. 553, see, also, *Rose's U. S. Notes*]; *West Virginia T. Co. v. Ohio R. P. L. Co.*, 22 W. Va. 600, [46 Am. Rep. 527]; *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434, [104 Am. St. Rep. 819, 67 L. R. A. 111, 48 S. E. 460]; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 672.) As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced. Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character (*Gibbs v. Consolidated Gas Co.*, *supra*), and from a reading of the contract it is apparent that its purpose in making the same was to prevent defendant from discontinuing the use of gas furnished by it and, in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in restraint of trade, but if upheld would tend to stifle competition and give plaintiff's assignor a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare, admits of no controversy.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2620. Second Appellate District, Division One.—February 19, 1919.]

A. L. ABRAHAM'S, Appellant, v. W. A. HAMMEL, as Sheriff, etc., et al., Respondents.

[1] SALE—CONDITIONAL SALE CONTRACT—TRANSFER BY VENDEE WITHOUT IMMEDIATE DELIVERY—VOID AS TO ATTACHING CREDITOR OF ORIGINAL VENDEE.—Where the vendee in possession of personal property under a conditional contract of sale assigned the contract with the consent of the original vendor to a third person, who assumed the payments specified in the contract, and without ever having taken the property into his possession made the specified payments to the original vendor and received a bill of sale from the vendor, but made an arrangement with his assignor under which the latter retained possession of the property, the sale and purported transfer from the original vendee and the conditional contract to his assignee was as to an attaching creditor of the former to be deemed fraudulent and void under section 3440 of the Civil Code, and a bill of sale from such assignee was ineffectual as a transfer of the property.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Tyrrell, Abrahams & Brown and Chas. W. Fricke for Appellant.

Strong & McCormick for Respondents.

SHAW, J.—Under a writ of attachment, issued in an action wherein F. W. Cole was plaintiff and G. G. Gillette was defendant, W. A. Hammel, as sheriff, levied upon and took possession of a certain automobile, title to which the plaintiff claimed was vested in Gillette. Thereupon plaintiff in this action filed a third-party claim with the sheriff and demanded delivery of possession of the property, which was refused.

This action for conversion followed, and judgment was entered in accordance with the verdict of a jury in favor of defendants.

The appeal is from the judgment and an order of court denying plaintiff's motion for a new trial.

The sole contention of appellant, which he presents without incorporating in the record the instructions given the jury, is that the verdict is not justified by the evidence; hence it is said the court should have granted his motion for a new trial.

[1] The evidence, in which there is some conflict, tended to show that on October 5, 1912, a conditional sale contract was made by the California Motor Company to Gillette, under which it, reserving the title to the car subject to the making of certain deferred payments thereon, when title was to vest in the vendee, delivered possession thereof to Gillette. On October 24th following, Gillette sold the car and, with the consent of the Motor Company, assigned the contract to J. A. Phillips as purchaser, who assumed the payments specified therein. On March 15, 1913, Phillips made the payments in compliance with the contract and received a bill of sale and receipt in full therefor, at which time he, *without having taken the car into his possession*, made an arrangement with Gillette whereby the latter was to retain possession thereof. Thereafter, on August 19, 1913, Phillips executed a lease of the car to Gillette's wife, but, in so far as disclosed by the evidence, she never acquired or took possession thereof, but the same continued in Gillette. On July 31, 1914, Phillips executed a bill of sale transferring his interest in the automobile to plaintiff, who at the time, *without obtaining possession* thereof from Gillette, gave Mrs. Gillette an option to purchase the car, which option, however, she never exercised.

It is alleged in the answer that all these transfers affecting the interest of Gillette in said car were made fraudulently, without consideration, and with intent to hinder and delay the creditors of Gillette, which, upon proper instructions, since the contrary is not shown we may assume were given, the jury upon the evidence might have found true. However this may be, it clearly appears that at the time the conditional sale was made to him by the Motor Company, Gillette acquired possession of the car, which, subject to the amount due thereon, he sold to Phillips who thereafter by payments made, extinguished the conditional sale contract, thus terminating all rights of either party and their assigns thereunder. Section 3440 of the Civil Code (excluding certain exceptions not here involved), declares that "every transfer of personal prop-

erty, . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, . . . " Under this provision, since the sale by Gillette to Phillips was "*not accompanied by an immediate delivery, and followed by an actual and continued change of possession,*" the sale and purported transfer to Phillips must, as to the attaching creditor, be deemed fraudulent and void. This being true, it follows that at the time Phillips sold the automobile to plaintiff the former had no title thereto, and hence the bill of sale to plaintiff was ineffectual as a transfer of the same. Conceding that he might have acquired title by taking the property into his possession, nevertheless plaintiff admits that he did not do so, but allowed Gillette to retain and control the same. The acts of the parties render the purported sale and transfer void as to the attaching creditor.

The judgment and order are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 18, 1919.

Shaw, J., Melvin, J., Lawlor, J., Wilbur, J., and Lennon, J., concurred.

[Civ. No. 2706. First Appellate District, Division Two.—February 19, 1919.]

WILLIAM SOUTH, Respondent, v. COUNTY OF SAN BENITO et al., Defendants; T. H. FRENCH et al., Appellants.

[1] **PLACE OF TRIAL—DEFENDANT AGAINST WHOM CAUSE OF ACTION NOT STATED—RIGHT OF CODEFENDANT.**—The joinder, as defendant, of one against whom no cause of action is stated does not deprive other defendants of the right to have the action tried in the county of their residence.

- [2] **MUNICIPAL CORPORATIONS—CARE OF BRIDGES AND STREETS—NEGLIGENCE OF OFFICERS—NONLIABILITY.**—In the absence of a statutory provision declaring otherwise, a municipal corporation in California is not liable in damages for the neglect of its officers or agents in the maintenance or care of streets or bridges.
- [3] **ID.—COUNTIES—JOINT BRIDGE—FAILURE TO MAINTAIN—NONLIABILITY FOR ACCIDENT.**—Neither a county nor its board of supervisors is liable for personal injuries received by one who, while riding in an automobile, was precipitated into the bed of a creek, the center line of which was the dividing line between this county and another, the accident having occurred in the latter county and the embankment over which the automobile was precipitated being in that county, and the accident having been caused by the failure to maintain a bridge over the creek as had formerly been done, there being no showing of a joint duty imposed by law upon the boards of supervisors of the two counties to construct the bridge, in the absence of an allegation in the complaint that they had come to an agreement as to the proportion of cost to be borne by each county and that funds were available for the construction of the bridge.
- [4] **ID.—LIABILITY OF PUBLIC OFFICERS—RULE.**—Under the law of this state, before a public official becomes liable for a breach of duty, the duty must be plain and mandatory, the means and ability to perform it must exist, and it must be such as not to involve the exercise of any discretion on his part, either as to its performance or nonperformance or as to the manner of its performance.
- [5] **ID.—POWERS OF SUPERVISORS—NONLIABILITY.**—Other than the power given by section 2713 of the Political Code to the boards of supervisors of two counties to construct a bridge across the line between the counties and to apportion the cost as previously agreed, the supervisors of one county had no authority to repair the road in the other county where the accident occurred, or to place warning signals thereon, and they cannot, therefore, be charged with liability under the provisions of section 1 of the act of April 26, 1911 (Stats. 1911, p. 1115).
- [6] **CHANGE OF PLACE OF TRIAL—FICTITIOUS DEFENDANTS.**—A fictitious defendant who has not been brought into court cannot be regarded in considering a motion for a change of venue.
- [7] **NEGLIGENCE—PLEADING—COMPLAINT INSUFFICIENT.**—Although it is not necessary for the term "negligence" to be used in pleading, it is necessary for it to appear by direct averment that acts causing an injury were done negligently, where the facts do not state a cause of action unless done negligently, unless the facts themselves necessarily exclude any hypothesis other than that of negligence.

APPEAL from an order of the Superior Court of Santa Clara County refusing to change place of trial. P. F. Gosbey, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Geo. W. Jean, Wyckoff & Gardner, Snook & Church and A. D. Shaw for Appellants.

D. M. Burnett and James P. Sex for Respondent.

LANGDON, P. J.—This is an appeal from the superior court of the county of Santa Clara refusing to change the place of trial of this action to San Benito County. The action is one to recover damages for personal injuries sustained by the plaintiff in an accident in which an automobile in which he was riding plunged over a precipice into the bed of San Felipe Creek. It is alleged that the center line of San Felipe Creek is the boundary line between the counties of San Benito and Santa Clara; that a county road and public highway led from Hollister in San Benito County to Gilroy in Santa Clara County and that for many years prior to January 1, 1914, there had been a bridge across San Felipe Creek at the point where said creek was crossed by said road, which bridge was maintained by the two counties jointly as a part of said road; that after January 1, 1914, no bridge was maintained at said point and no means were provided for crossing the creek, but that at the point where the bridge had formerly been there existed on each side of the creek from January 1, 1914, to June 29, 1914, a sheer drop of about twenty-five feet from the surface of the roadway to the bed of the creek, a condition dangerous to persons traveling over the road; that immediately before reaching the declivity on the San Benito side there was a small and narrow board or scantling placed across the road, but no other barriers and no lights; that on the night of June 29, 1914, plaintiff, riding in an automobile as the guest of the defendant J. A. Phippen, who was driving from Hollister toward Gilroy, was precipitated over the declivity on the San Benito side, whereby he received the injuries complained of. It is also alleged that it was the duty of the defendant counties and the defendant supervisors of both counties to replace said bridge and repair

said highway and make the same passable, but because of their negligence, carelessness, and wrongful failure to replace said bridge and repair said highway and make the same passable, plaintiff sustained the injuries of which he complains.

It appears that the appellants are the five members of the board of supervisors of San Benito County, and that they are all residents of San Benito County. The other defendants in the action were: County of San Benito, county of Santa Clara, H. S. Hersman, A. L. Hubbard, H. M. Ayer, John Roll, and R. E. Mitchell, personally and as members of and constituting the board of supervisors of the county of Santa Clara, and J. A. Phippen and John Doe.

Appellants urge that their motion in the court below should have been granted, for the reason that there is no cause of action stated against the defendants other than themselves, and that such other defendants are, therefore, improperly joined.

[1] It is settled that the joinder as party defendant of one against whom no cause of action is stated does not deprive the other defendants of the right to have the action tried in the county of their residence. (*Donohoe v. Wooster et al.*, 163 Cal. 114, [124 Pac. 730]; *Bartley et al. v. Fraser et al.*, 16 Cal. App. 560, [117 Pac. 683].)

It seems clear, under the decisions, that no cause of action exists against the county of Santa Clara or against the supervisors of said county, either individually or by virtue of their office.

On the question of the liability of the county, we have the following language in *Brunson v. City of Santa Monica*, 27 Cal. App. 89, [148 Pac. 950]:

[2] "In the absence of a statutory provision declaring otherwise, a municipal corporation in California is not liable in damages for the neglect of its officers or agents in the maintenance or care of streets or bridges (*Winbigler v. City of Los Angeles*, 45 Cal. 36); nor for such negligence committed while engaged in repairing a sewer. (*Chope v. City of Eureka*, 78 Cal. 588, [12 Am. St. Rep. 113, 4 L. R. A. 325, 21 Pac. 364].) The case at bar comes within the doctrine of these cases of nonliability. The complaint does not definitely state for what purpose the so-called 'dump' was being maintained; but it is stated that the dump was a public work of the city and that the plaintiff was compelled, as well as permitted, to use it.

This implies the use of a power of compulsion for some public reason, such as the exercise of the police power for protection of the public health. The decisions in other states, to which we are referred in the brief of appellant, show that there is a conflict of decision on the question here presented; but it is equally clear that the rule in this state is as above stated.

"An attempt has been made to modify by statutory provisions the rule of law above stated. An act approved April 26, 1911 (Stats. 1911, p. 1115), is entitled: 'An act relating to the liability of public officers for damages resulting from defects and dangers in streets, highways, public buildings, public work or property.' . . .

"Here we have an act which in its title purports to deal with the liability of public officers for damages resulting from certain specified causes. This cannot by any process of reasoning be made to include the subject of liability of the public corporations in whose service such officers may be. The act is void as to any purported legislation therein contained attempting to create a new rule of liability as against such corporations."

The entire matter is carefully considered in the case of *Chafor v. City of Long Beach*, 174 Cal. 478, [Ann. Cas. 1918D, 106, L. R. A. 1917E, 685, 163 Pac. 670], and it is stated that in so far as municipal corporations exercise powers conferred on them for purposes essentially public, they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action is given.

To the same effect is the case of *Coffey v. City of Berkeley*, 170 Cal. 258, [149 Pac. 559].

[3] We next come to consider the liability of the supervisors of Santa Clara County. The accident occurred in San Benito County and the embankment over which the automobile was precipitated was on the road in San Benito County. There is no dispute about these facts. The theory upon which the supervisors of Santa Clara County was sought to be held is that there was a joint duty imposed by law upon the boards of supervisors of these two counties to construct the bridge, and that their liability arises from their failure to do so before the accident occurred.

[4] It has been held in this state that before a public official becomes liable for a breach of duty, the duty must be plain and mandatory, the means and ability to perform it must exist, and it must be such as not to involve the exercise of any discretion on his part, either as to its performance or non-performance or as to the manner of its performance. (*Doeg v. Cook*, 126 Cal. 213, [77 Am. St. Rep. 171, 58 Pac. 707]; *Taylor v. Manson*, 9 Cal. App. 382, [99 Pac. 410].) In *Taylor v. Manson*, *supra*, the court said:

"As the members of the board are public officers, with their duties prescribed by law, and as the other defendants are sureties on their official bonds, they can only be held for non-feasance as to some act or duty required of the board by reason of their office, or for the negligent performance of some act or duty where the act or duty is plain. It is only where the duty is plain and certain and such duty is negligently performed or not performed at all, that the officer is held liable to a private individual. If the act is a matter of discretion, or the officer has not the means or ability to perform it, he is not liable nor are his sureties on his official bond. (*Doeg v. Cook*, 126 Cal. 213, [77 Am. St. Rep. 171, 58 Pac. 707]; *Shearman & Redfield on Negligence*, sec. 340, and cases cited; *Robinson v. Chamberlain*, 34 N. Y. 389, [90 Am. Dec. 713]; *Elliott on Roads and Streets*, 506.) The reason for the rule is plain. An officer is a public servant. His remuneration is often small. His implied agreement is to faithfully perform the duties required of him by law."

The only statute in force imposing any duties on boards of supervisors in reference to the construction or maintenance of county boundary line bridges is found in section 2713 of the Political Code, and is as follows: "... Bridges crossing the line between counties must be constructed by the counties into which such bridges reach, and each of the counties into which any such bridge reaches shall pay such portion of the cost of such bridge as shall have been previously agreed upon by the boards of supervisors of said counties. . . ."

There is no allegation in the complaint that the two boards had come to an agreement as to the proportion of the cost to be borne by each county, or that there was any fund available for the construction of the bridge by the two boards, or at all. It does not appear, then, that the construction of this bridge was the plain, certain, and ministerial duty of the

supervisors of Santa Clara County. Until an agreement has been reached by the two boards, it would seem that neither board has the power to expend the county moneys for such work, and in reaching the agreement provided for by the Political Code, clearly the boards would be exercising a legislative discretion.

[5] Other than the power given by the above-quoted section to agree with the supervisors of San Benito County upon the division of the cost of a bridge crossing the county line, the supervisors of Santa Clara County clearly had no authority to repair the road in San Benito County where the accident occurred, or to place warning signals thereon, and they, therefore, cannot be charged with liability under the provisions of section 1 of the act of April 26, 1911 (Stats. 1911, p. 1115), hereinbefore referred to.

However, while it was contended in the briefs that the counties and the supervisors were liable, it was admitted by counsel for respondent upon the oral argument of this case that there was no cause of action against either the counties or the supervisors of Santa Clara County, and so it is unnecessary for us to discuss these questions further.

[6] A fictitious defendant, John Doe, was named, and it was alleged that he was the roadmaster for the defendant French in the supervisorial district in San Benito County. Apart from the fact in this case that the uncontradicted affidavit of Mr. French appears in the record to the effect that there was no roadmaster in his district at any of the times mentioned in the complaint, and it would seem, therefore, that this defendant is fictitious in fact as well as in name, it has been held that fictitious defendants who have not been brought into court are not to be regarded in the consideration of the motion for change of venue. (*Yuba County v. North American etc. Co.*, 12 Cal. App. 223, [107 Pac. 139].)

The one remaining question in the case and the one that is decisive of this appeal is whether or not a cause of action is stated against the remaining defendant, J. A. Phippen, and to that question we shall direct our attention. The allegations of the complaint with reference to defendant Phippen are as follows:

"That on the night of June 29, 1914, at the hour of about 11:55 o'clock, this plaintiff was the guest of, and riding with, said J. A. Phippen, who was then and there driving his auto-

mobile along said highway in said San Benito County, in the direction of Gilroy; that said Phippen was so driving said automobile at a prudent rate of speed; that this plaintiff was unacquainted with the condition of said road and the danger incident to traveling thereon, and to the absence of said bridge, and the existence of said drop or declivity from said roadway to the bed of said creek.

"That as the said automobile approached said point where said bridge had formerly been, and where said road formerly crossed said creek, no lights or other barriers were displayed or shown to warn the traveling public of the danger there present.

"That immediately before reaching said declivity or drop there was placed across said road a small and narrow board or scantling, but the same bore no lights or other signals, and the same was not visible to this plaintiff until said automobile had collided therewith, although the lights of said automobile were burning brightly, and although the plaintiff was constantly on the alert for possible danger.

"That the said defendant, J. A. Phippen, while so operating said automobile and while approaching said point, did fail to observe said scantling or board, and did so operate his said automobile as to come in collision with said board, or scantling, so set across said road, and that as soon as said Phippen so came in collision with said scantling, he, the said Phippen, attempted to stop said automobile, but failed to do so, before the same reached said drop or declivity, and that when the automobile reached said drop or said declivity, it was precipitated over said bank," etc.

Plaintiff then states the nature of his injuries and damage, and continues in his complaint, as follows: "That at all times herein mentioned it was the duty of the defendant counties, and the duty of all of the other defendants, *except the defendants John Doe and J. A. Phippen*, as supervisors, to replace said bridge and repair said highway, and make the same passable, etc."

We fail to find in the above, either an allegation of negligence or any allegations of fact from which negligence can be inferred. On the contrary, the complaint alleges that the said Phippen was driving his automobile "at a prudent rate of speed"; that "there were no lights or other barriers dis-

played to warn the traveling public of the danger there present"; that the narrow board or scantling was placed across the road and bore no lights or other signals and the same was not visible to the plaintiff until the automobile had collided therewith, although the plaintiff was constantly on the alert for possible danger. These allegations would seem to negative rather than to assert negligence on the part of the defendant Phippen.

[7] Although it is not necessary for the term "negligence" to be used in pleading, it is necessary for it to appear by direct averment that the acts causing the injury were done negligently, where the facts stated do not constitute a cause of action unless done negligently, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. (*Silveira v. Iverson*, 125 Cal. 266, [57 Pac. 996].) It should appear in what respects the defendant was negligent and that such negligence had a causal connection with plaintiff's injury. (*Lang v. Lilley and Thurston Co.*, 20 Cal. App. 264, [128 Pac. 1031].) While it is sufficient to allege negligence in general terms, the particular act alleged to have been negligently done must be specified. (*Stephenson v. Southern Pacific Co.*, 102 Cal. 147, [34 Pac. 618, 36 Pac. 407].)

We think this pleading does not meet the general rule or the rule laid down in this state. A demurrer to the complaint on the part of defendant Phippen would have to be sustained. A cause of action not being stated against Phippen, there remain no other defendants except those who are nonresidents of the county in which the action was brought; this being true, the motion for a change of venue should have been granted. The order appealed from is reversed, with directions to the court below to grant appellants' said motion.

Brittain, J., and Haven, J., concurred.

[Crim. No. 817. First Appellate District, Division One.—February 19, 1919.]

THE PEOPLE, Respondent, v. WILLIAM S. CARD,
Appellant.

- [1] **CRIMINAL LAW—MURDER IN SECOND DEGREE—CRIMINAL ABORTION—CORPUS DELICTI—EVIDENCE SUFFICIENT.**—In this prosecution for murder alleged to have been committed by the defendant in the performance of an abortion, and in which the defendant was convicted of the crime of murder in the second degree, the evidence is examined and found abundantly sufficient to establish that the death of the young woman in question was due to an operation performed upon her, which was criminal in character as not necessary to preserve her life.
- [2] **ID.—VERDICT OF GUILTY SUSTAINED BY EVIDENCE.**—The evidence was also sufficient to sustain the verdict of the jury holding the defendant responsible for the decedent's death by means of a criminal abortion.
- [3] **ID.—ACCOMPLICE—TESTIMONY CORROBORATED.**—The testimony of a companion of the deceased, who the court instructed the jury was an accomplice, is also examined in such case and found to be sufficiently corroborated as to all its essential parts.
- [4] **ID.—UNPREJUDICIAL INSTRUCTION THAT ONE WAS AN ACCOMPLICE IN FACT.**—Error cannot be predicated by the defendant on the action of the court in instructing the jury that a witness, a companion of the deceased, was, as matter of fact, an accomplice, where, throughout the trial, defendant had taken the position that such person was an accomplice whose testimony required corroboration.
- [5] **ID.—EVIDENCE—STRIKING OUT ANSWER NOT RESPONSIVE.**—An answer by a physician who had treated the deceased some weeks previous to her death, which answer, not responsive to the question asked her, stated that she had herself admitted a previous attempt to bring about an abortion, was properly stricken out.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Cabaniss, Judge. Affirmed.

The facts are stated in the opinion of the court.

Nathan C. Coghlan, R. P. Henshall and Samuel M. Shortridge for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, and Louis H. Ward for Respondent.

RICHARDS, J.—This is an appeal from a judgment upon conviction of the defendant of the crime of murder in the second degree, claimed to have been committed by the defendant in the performance of an abortion upon the person of one Mabel Solomonson, who died shortly thereafter.

The main facts of the case which it is the claim of the prosecution were sufficiently established by the evidence to justify the defendant's conviction are these: On May 21, 1918, the deceased girl, accompanied by a female friend named Edna Swanson, came from Turlock to San Francisco, registering at the Argonaut Hotel, where they remained overnight, occupying the same bed. The following morning they removed to the Keystone Hotel, where they took a room. While there the decedent disrobed in the presence of her companion and took a sponge bath. She was then apparently in good physical condition and had no menstrual flow. At about half-past 11 in the morning of that day the two girls went to the Westbank Building, in this city, where the defendant, who is a physician, had his offices. They entered his reception-room and were there met by an assistant of the defendant, named Mrs. Hunt, who, being informed which of them was the patient, directed Miss Solomonson to go to another room down the corridor, said to be the defendant's private office. In a few moments the deceased returned and asked her friend for \$20, upon receiving which she went back in the direction whence she had come. This was shortly before 12 o'clock. At 1 o'clock Mabel Solomonson was assisted into the reception-room from an adjoining room by a nurse named Mrs. Morgan, who was also one of the defendant's assistants on that day, and was delivered into the care of Miss Swanson, with the instruction to take her to her home or room and give her a dose of salts, which instruction the defendant had just directed her to give. At this time the Solomonson girl was greatly distressed, was weak and pale, moved with great difficulty, and had to be assisted to her room in the hotel which was about half a block away. Upon reaching her room she was so weak that her companion helped her into bed. She was then discovered to be bleeding profusely; a towel, identified as being of the same kind used in the defendant's office, was found upon her person. Her condition being alarming, another physician was called in, who recommended that the girl

be taken to the Emergency Hospital. Before the ambulance arrived the girl died, and the autopsy surgeon found that she had bled to death as a result of an operation for abortion which had very recently been performed upon her. The defendant's arrest and trial for murder followed, and resulted in his conviction of murder in the second degree.

[1] The appellant makes several points upon each of which he relies for a reversal. His first contention is that the *corpus delicti* was not proved. This contention is without merit. The autopsy surgeon who conducted the autopsy on the day of her death testified that except for her pregnancy and the abortion she was in the normal healthy physical condition for a young woman of her years, and that she had died as the result of the operation performed only a few hours before her decease. Miss Swanson, her companion during every hour of the time she was in San Francisco, except the hour or so when she was in the private office of the defendant, testified that the deceased was in good health and was not flowing up to the time she entered the defendant's offices, and that she emerged therefrom weak and distressed and hardly able to walk, and that on reaching her room a short distance away her bandages and clothing were saturated with blood. We think this evidence abundantly sufficient to establish that the death of this girl was due to an operation performed upon her which was criminal in its character as not necessary to preserve her life.

[2] The next contention of the appellant is that there was no sufficient evidence connecting the defendant with the commission of the crime. It is true that the deceased went from the offices of the defendant to an all too speedy death to permit her statement as to what had occurred while she was in the defendant's offices to be given in the form of a dying declaration, but we think that there is sufficient evidence otherwise to point unerringly to the defendant as the person performing the operation which produced her death. The evidence shows that the defendant maintained offices as a physician and surgeon in the Westbank Building with several connecting rooms, one of which was his private office and another was his reception-room, to which those seeking his services were in the first instance admitted; that between these two rooms was a system of bells so arranged that a button

touched in the reception-room conveyed the information to the occupant of the private office that a patient was in waiting, and the touching of a button in the private office by its occupant informed the assistant in the reception-room that the patient should be sent to the private office. The evidence shows that these responding bells were rung shortly after the deceased and her companion were admitted to the defendant's reception-room. The evidence further showed that no other physician than the defendant occupied his private office. The evidence proceeds to show that when the defendant's assistant was thus advised that the defendant was in his private office and ready for the patient, the deceased was directed to his door; that she returned in a few moments to the reception-room to get a sum of money, upon receiving which she went back into the defendant's private office; that she remained away from the reception-room, where her friend remained in waiting, for the space of about an hour, when she was helped into the reception-room by one of the defendant's assistants, and there given over to her friend with the instruction that the patient was to be taken to her home or room and given a dose of salts. She was then in a condition indicating to the point of certainty that during the hour spent in the defendant's private office something had been done to her which had destroyed her immediately preceding state of normal health, and left her weak, distressed, hardly able to walk, and bleeding to an extent which within a short while sapped her life; upon reaching her room, less than a block away, she had to be put to bed, and there was then found upon her a towel identical with those in use in the defendant's office; she died within a very few hours, and, as we have seen, her death was due to an abortion performed that day. When the defendant was interviewed by a detective officer, shortly after the girl's death, his demeanor, words, and actions were very far from those of an innocent man. We think this evidence was sufficient to justify the finding of the jury holding the defendant responsible for the decedent's death by means of a criminal abortion.

[3] The appellant's next contention is that the witness Edna Swanson was an accomplice of the defendant in procuring the operation to be performed upon her friend, and that her testimony was not sufficiently corroborated to have

justified its acceptance by the jury as the basis of its verdict. The question whether the witness was or was not an accomplice within the purview of the law relating to this class of cases was removed from consideration by the court's instruction that she was such accomplice; but conceding this, we are satisfied that her evidence was sufficiently corroborated as to all of its essential parts. Her story as to what occurred within her knowledge and observation while in the office of the defendant is supported by the testimony, reluctantly drawn from them, of the two witnesses who were acting as the defendant's assistants on that fatal day. It is shown sufficiently by their halting and hesitating admissions that the defendant was in his office at the time, fixed by the witness Swanson, of the presence of herself and companion there; the system of bells as testified to by one of them agrees with the statement of the alleged accomplice as to the sounding and significance of the bells, while her evidence as to the return of the deceased to her with the statement that she was to be taken home and given a dose of salts is supported by the admission of the witness Mrs. Morgan that such an instruction was received by her from the defendant and was conveyed at that time. The witness Swanson's testimony as to the physical condition of the deceased immediately before and immediately after the visit to the defendant's office is supported by the evidence of the autopsy surgeon as to the normality of the deceased woman's physical condition outside of her state of pregnancy. We think the foregoing constitutes sufficient corroboration of this witness, assuming her to be, as the court instructed the jury, an accomplice.

[4] With respect to the next contention of the appellant, to the effect that the trial court committed reversible error in giving an instruction as to a matter of fact, by its instruction that the witness Swanson *was* an accomplice, little need be said. The record before us discloses that throughout the trial and upon this appeal it has been the defendant's consistent position that the witness Swanson was an accomplice whose testimony required corroboration. In harmony with this position the defendant requested a set of instructions upon the subject of accomplices and their corroboration which could only have had reference to the witness Swanson. These requested instructions were not given by the court, for the reason that the subject was covered by its own instruction

upon the subject to which the appellant now urges this objection. He cannot, therefore, be in a better position than he would have been had his own requested instruction been given, in which event he could not here be heard to urge his present objection.

As to the other instructions which the appellant requested, and which for the same reason were not given, no special emphasis is laid upon them upon this appeal; but we are satisfied from a careful reading of the entire body of the court's instructions that the jury were fairly, fully, and correctly instructed as to the law of the case.

The final contention of the appellant is that the trial court committed prejudicial error in striking out the testimony of one Dr. Sarkasian, who undertook to give evidence as to statements which the deceased girl had made to him some weeks prior to her death while she was in Denver, Colorado, and while he was treating her for anaemia. The answer of this witness which was stricken out was given in reply to the following question asked by counsel for the defendant: "Q. Did you discover from your examination of her whether or not there had been an attempt made previously to bring about an abortion?" to which the witness replied: "A. Well, she admitted that herself."

[5] The court properly ordered that answer stricken out. It was not responsive to the question. It was merely the conclusion of the witness as to the effect of whatever statement the deceased had made to him, and did not purport to be such statement. Moreover, the defendant was not prejudiced by the ruling of the court in this regard, since the record shows that the witness proceeded to answer the question correctly and fully by stating that as a result of his physical examination of the deceased while his patient upon this occasion, he found that an abortion had previously been attempted, apparently by herself. We therefore find no reversible error in the record before us.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 21, 1919, and a petition to

have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 18, 1919.

All the Justices concurred.

[Civ. No. 2707. First Appellate District, Division Two.—February 19, 1919.]

WILLIAM SOUTH, Respondent, v. T. H. FRENCH et al.,
Defendants; T. H. FRENCH, Appellant.

- [1] PLACE OF TRIAL—DEFENDANT AGAINST WHOM NO CAUSE OF ACTION STATED.—The joinder as party defendant of one against whom no cause of action is stated does not deprive other defendants of the right to have the action tried in the county of their residence.
- [2] NEGLIGENCE—ACTION FOR PERSONAL INJURIES—AUTOMOBILE ACCIDENT—PLUNGING DOWN EMBANKMENT—PLEADING—INSUFFICIENT COMPLAINT AGAINST DRIVER.—In an action by the guest of an automobile driver for damages for personal injuries sustained when the automobile plunged over an embankment into the bed of a bridgeless creek, the complaint failed to state a cause of action where the only allegation of negligence was that the defendant "negligently failed to observe that the said road terminated at said creek in such drop or declivity," while it was also alleged that no lights were displayed nor any warnings of any kind given of the fact that the declivity existed, or that the defendant had any independent knowledge, and it was therefore apparent the defendant could not be negligent in failing to observe something it was impossible for him to observe.

APPEAL from an order of the Superior Court of Santa Clara County refusing to change place of trial. P. F. Gosbey, Judge. Reversed.

The facts are stated in the opinion of the court.

George W. Jean, Wyckoff & Gardner, Snook & Church and A. D. Shaw for Appellant.

D. M. Burnett and James P. Sex for Respondent.

LANGDON, P. J.—This is an appeal from an order of the superior court of the county of Santa Clara denying appellant's motion to change the place of trial of this action to San Benito County. The action is one to recover damages for personal injuries sustained by the plaintiff in an accident in which an automobile in which he was riding plunged over a precipice into the bed of San Felipe Creek.

The defendant French, who is the appellant here, is the supervisor of district No. 1 of the county of San Benito, and it appears without contradiction that he is a resident of San Benito County. The defendant John Doe, sued by a fictitious name, is alleged to be the roadmaster of the same district in San Benito County, and it also appears that he is a resident of San Benito County. [1] The only question presented upon this appeal, then, is whether or not a cause of action has been stated against the remaining defendant, J. A. Phippen, for the joinder as party defendant of one against whom no cause of action is stated, does not deprive the other defendants of the right to have the action tried in the county of their residence. (*Donohoe v. Wooster et al.*, 163 Cal. 114, [124 Pac. 730]; *Bartley et al. v. Fraser et al.*, 16 Cal. App. 560, [117 Pac. 683].)

In the case of *South v. County of San Benito et al.*, ante, p. 13, [180 Pac. 354], which arose out of the same accident, this court has decided that a pleading containing substantially the same allegations as the complaint in the present case does not state a cause of action against Phippen. The difference in the allegations in the two cases is not sufficient to warrant a different conclusion in this case. In the present case, the plaintiff alleges that he was riding in the automobile of defendant J. A. Phippen as his guest; that said Phippen was driving at a prudent rate of speed; that the plaintiff was unacquainted with the condition of the road and the danger incident to traveling thereon, and was unacquainted with the presence of the sheer drop or perpendicular declivity of about twenty feet from the surface of the roadbed to the bed of said creek; that as the automobile approached the point where said roadway left said creek and terminated in such perpendicular drop or declivity, *no lights were displayed or other warning given of the danger there present, and no warning lights were displayed or warning of*

any kind given of the fact that said road was not safe to travel on, or that said road approached said bank of said creek and terminated in such drop or declivity; that as the said J. A. Phippen was so driving and operating his said automobile, and approaching said point, he negligently failed to observe the fact that said road terminated at said creek in such drop or declivity, and so drove his automobile as to cause the same to approach so close to said drop or declivity as to make it impossible to stop the same before the same went over said drop or declivity and was precipitated to the bottom of said creek; that the plaintiff using ordinary care and being constantly on the alert for possible danger could not, while seated in the rear seat of said automobile, see the condition of said road, or ascertain the fact that the same terminated at said creek.

[2] The only allegation of negligence made against the defendant Phippen is that he "negligently failed to observe the fact that said road terminated at said creek in such drop or declivity." The mere statement that he did this negligently is not sufficient in the face of other allegations which clearly show an absence of negligence on his part. Since it is alleged that no lights were displayed nor any warnings of any kind given of the fact that the declivity existed or that the road was unsafe, or that the said road approached the bank of said creek—and it is not alleged that the defendant Phippen had independent knowledge of these facts—it is apparent that Phippen could not be negligent in failing to observe something which it was impossible for him to observe.

While some cases have held that it is a sufficient allegation of negligence to state that the act complained of was done negligently by the defendant, specifying, however, the particular act alleged to have been negligently done (*Fisher v. Western Fuse & Explosives Co.*, 12 Cal. App. 739-747, [108 Pac. 659]), it seems that this is true only where such allegation is not contradicted by other allegations of the complaint. Where it appears from other specific facts alleged that the act alleged to have been done negligently was not done negligently, the complaint is insufficient to charge negligence. (*Citizens' St. Ry. Co. v. Abright*, 14 Ind. App. 433, [42 N. E. 239, 1028]; *Louisville etc. Ry. Co. v. Bates*, 146 Ind. 564, [45 N. E. 109].) This rule, indeed, would seem to be the only

natural and logical one. A pleader should not be allowed to negative his own averments and yet ask that they be considered sufficient.

As plaintiff has not stated a cause of action against defendant Phippen, and as the other defendants are residents of San Benito County, the motion to change the place of trial to San Benito County should have been granted.

The order appealed from is reversed, with directions to the court below to grant said motion.

Brittain, J., and Haven, J., concurred.

[Civ. No. 2593. Second Appellate District, Division One.—February 19, 1919.]

JESSE FRANKLIN, Administrator, etc., Respondent, v.
SOUTHERN PACIFIC COMPANY (a Corporation),
et al., Appellants.

- [1] **WATERS AND WATERCOURSES—NATURAL WASH—OBSTRUCTING BY EMBANKMENTS AND DIKES—DIVERTING FLOW UPON LAND OF ANOTHER—ACTION FOR DAMAGES AND FOR INJUNCTION TO ABATE NUISANCE—JURY TRIAL.**—In an action for damages and for an injunction to abate a nuisance consisting of the maintenance of embankments and dikes by means of which the waters of a natural wash are obstructed and diverted, and the flow precipitated upon plaintiff's land, the parties are entitled as of right to a trial by jury of the issue as to damages.
- [2] **ID.—GENERAL VERDICT—EFFECT OF.**—Where such trial is had, the general verdict of the jury is binding upon the court, which has no power to vacate it except upon motion for new trial.
- [3] **ID.—STATUTE OF LIMITATIONS, HOW PLEADED.**—In such action an allegation in the answer that the improvements, embankments, etc., described in plaintiff's complaint, which it is alleged caused a diversion of the flow of water, had been erected "for more than five years prior to the institution of the action," sufficiently pleaded the statute of limitations.
- [4] **ID.—OMISSION OF FINDING ON STATUTE OF LIMITATION.**—In such case, in ruling on defendants' motion for a nonsuit, the court erred in holding that the statute of limitations had not been sufficiently pleaded, and consequently erred in making no finding upon the issue tendered upon that statute.

- [5] **Id.—STATUTORY MODE OF PLEADING NOT EXCLUSIVE.**—While section 458 of the Code of Civil Procedure provides that the statute of limitations may be pleaded as a bar to any action, by giving the number of the section and subdivision thereof relied on, such mode of pleading is not exclusive.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Reversed.

The facts are stated in the opinion of the court.

Henry T. Gage and W. I. Gilbert for Appellants.

B. J. Bradner for Respondent.

SHAW, J.—In this action plaintiff sought to recover for damages alleged to have been sustained by the wrongful acts of defendants in constructing and maintaining certain embankments and dikes on their right of way, as a result of which and lack of sufficient culverts therein, the waters of a natural wash were obstructed and diverted from their usual course and the flow thereof precipitated upon his land; and also sought a decree enjoining defendants from maintaining such obstruction, which, if continued, it was alleged would cause him irreparable damage.

In accordance with demand therefor, a jury was impaneled, to which the issue as to damages was, upon evidence adduced and instructions given by the court, submitted, as a result of which it rendered a verdict in favor of defendants. Thereafter, notwithstanding such verdict and in disregard thereof, the court made findings upon all the issues and upon which it awarded plaintiff two thousand five hundred dollars damages sustained, and made a decree perpetually enjoining defendants from maintaining the obstruction by means of which it was alleged defendants had wrongfully diverted the flow of water upon plaintiff's land.

From the judgment and decree so rendered, defendants have appealed.

[1] Defendants' first contention is that the parties were entitled as of right to a trial by jury of the issue at least as to the damages alleged to have been sustained, and that its verdict was binding upon the court which, in the absence of

proceedings for a new trial, had no power to vacate and set aside the same.

This identical question was before this court in the case of *Farrell v. City of Ontario*, 39 Cal. App. 351, [173 Pac. 740], wherein the Honorable Louis M. Myers, as justice *pro tem.* (who presided as trial judge in the instant case), in an exhaustive opinion reviews a number of divergent authorities of this state touching the question, as a result of which it was held that in an action for damages and for an injunction for the abatement of a nuisance, the parties are entitled to a jury trial upon the issue as to damages [2] and where such trial is had, the general verdict thereon is binding upon the court, which has no power to vacate it except upon motion for new trial. We refer, without further discussion, to that opinion and the authorities referred to therein as determinative of the question.

[3] In their answer, "for a second, further, separate, and distinct defense," defendants alleged "that all of said improvements, in so far as the general right of way of the said defendants, including the improvements of ditches described in plaintiff's complaint, is concerned, were erected more than five years prior to the institution of this action, and the cause of action attempted to be set up by plaintiff, if any, is now barred by the statute of limitations of this state, said statute of limitations being hereby pleaded as a bar to this action."

[4] As to this defense the court, in ruling upon defendants' motion for nonsuit, stated that the statute of limitations as a defense had not been sufficiently pleaded to put it in issue, and hence made no finding thereon. In this ruling and omitting to make a finding as to the issue tendered, the court erred. [5] While section 458 of the Code of Civil Procedure provides that the statute of limitations as a bar to an action may be pleaded by giving the number of the section and subdivision thereof relied upon, nevertheless such mode of pleading is not exclusive. As said in *Manning v. Dallas*, 73 Cal. 420, [15 Pac. 34]: "There are only two ways of pleading the statute, one by stating the facts showing the defense and the other by stating 'generally that the cause of action is barred by the provisions of section (giving the number of the section, and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure.'" In the pleading

under review the defendants stated the facts, namely, that the improvements, embankments, dikes, and ditches described in plaintiff's complaint, and which it is alleged caused a diversion of the flow of water, had been erected for *more than five years prior to the institution of the action*. In our opinion, the allegation was a sufficient pleading of the facts to raise the issue as to whether or not the cause of action was barred by the statute of limitations.

We do not feel called upon to determine the correctness of the court's statement that the statute would not commence to run until plaintiff had suffered damage from the obstruction, but having concluded the statute of limitations as a bar to the action was sufficiently pleaded, it clearly tendered an issue upon which defendants were entitled to a finding, and this was not made by the trial court.

The judgment appealed from is reversed and the cause remanded to the trial court, with direction to enter judgment in accordance with the general verdict of the jury upon the issue as to damages; and that as to the equitable issue involving plaintiff's right to the injunction prayed for in his complaint, a new trial thereof be had upon such evidence as may be properly received thereon.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 18, 1919.

All the Justices concurred.

[Civ. No. 2395. Second Appellate District, Division One.—February 21, 1919.]

ELIZABETH WOODS, Appellant, v. I. I. BENNETT, Respondent; G. W. REILLY, Defendant.

- [1] **DEED — COVENANT AGAINST ENCUMBRANCES — BREACH — LIABILITY OF GRANTOR.**—The existence of a judgment lien is a breach of a covenant in a deed of conveyance that the land is free and clear of encumbrances, but as the covenant is one of indemnity, the grantor is liable in nominal damages only, where the grantee has suffered no actual injury from the encumbrance.

- [2] **ID.—COVENANTOR'S CONTINGENT LIABILITY.**—The covenantor is also under a contingent liability to pay the full amount of the judgment upon its satisfaction by the grantee by payment.
- [3] **ID.—SUBSEQUENT AGREEMENT BY GRANTOR TO CLEAR TITLE—CONSIDERATION — EXTINGUISHMENT OF EXISTING DIRECT LIABILITY.**—The liability of the covenantor for such breach is a sufficient consideration for a subsequent agreement on his part to clear the title to the property in question, and such subsequent agreement extinguishes the then existing direct liability.
- [4] **ID.—BREACH OF SUBSEQUENT AGREEMENT—LIABILITY.**—On breach of such subsequent agreement by failure to perform it, the covenantor becomes immediately liable to the covenantee in the amount of the judgment as damages.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Reversed.

The facts are stated in the opinion of the court.

John J. Craig for Appellant.

Barstow, Rohe & Jeffers for Respondent.

CONREY, P. J.—Appeal by plaintiff from judgment entered in favor of the defendant Bennett.

The action was brought by plaintiff to recover damages for breach of the following written agreement made by the defendant Bennett:

“Los Angeles, Calif., June 6, 1912.

“I hereby agree to clear title to lot 17 in block 36 in the Central Arlington Heights Tract as per map recorded in book 30, page 51, miscellaneous records of Los Angeles county, within ninety days from above date.

“Details of Above.

“I. I. Bennett having deed to Mrs. Elizabeth Woods the above mentioned property representing the same to be free and clear except a certain trust deed for \$1000.00. It appears upon examination of said title that there appears a judgment of \$424.80 and \$7.10 costs against G. W. Reilly in favor of G. B. Lohman docketed Sept. 18th, 1911, and recorded in book 231, page 192, of judgments. Which the above named Bennett agrees to settle with accrued interest within ninety days from the date above mentioned.

“Original Witness E. W. Knapp, June 6, 1912.

“I. I. BENNETT.”

On the sixteenth day of May, 1912, respondent deeded to appellant the land described in the foregoing contract, "free and clear, except a certain trust deed of One Thousand Dollars (except 1912 and 1913 taxes)." On May 24, 1912, appellant deeded the same property to Ellen B. Crowder, including in said deed like covenants against encumbrances as above noted. On June 5, 1912, the Los Angeles Abstract & Title Company issued a certificate to Crowder showing a judgment lien against said property, being the same judgment lien referred to in the contract above set forth. That certificate was introduced in evidence at the trial of this action, together with admissions sufficient to show that the judgment lien actually existed as recited in said contract. In December, 1912, the plaintiff paid Crowder the amount of said judgment, or perhaps it would be more accurate to say, paid to her by reason of said judgment an amount equal to the amount of the judgment. It does not appear that Crowder ever paid the judgment, but it does appear that Bennett never paid it and, so far as appears from the evidence, the judgment remained in force until the lien thereof expired by lapse of time. At the time of commencement of this action the lien of the judgment had not yet expired.

[1] The principal defenses urged against the action are that there was no consideration for the agreement, and that the plaintiff has not suffered any damage by reason of any breach thereof. The author of Devlin on Deeds (third edition, section 918), says: "It is, I think, well settled that where the encumbrance has not been paid off by the purchaser of the land, and he has remained in quiet and peaceable possession of the premises, he cannot have relief against his contract to pay the purchase money, or any part of it, on the ground of defect of title. The reason is that the encumbrance may not, if let alone, ever be asserted against the purchaser, as it may be paid off or satisfied in some other way; and then it would be inequitable that any part of the purchase money should be retained." [2] But, at the end of section 920, he says: "If the covenant, however, is in the form of an agreement to pay and discharge the encumbrances, the covenantee, although he has not extinguished them, is entitled to recover the amount of the encumbrances." These rules, as stated in the textbook, are supported by various cases there cited. Concerning the rule first stated, it is said in *Fraser v. Bentel*, 161 Cal. 390,

394, [Ann. Cas. 1913B, 1062, 119 Pac. 509]: "Inasmuch, however, as the covenant against encumbrances is merely one of indemnity (Rawle's Covenants for Title, sec. 188), no more than nominal damages can be recovered on account of an encumbrance which has inflicted no actual injury upon the grantee." It thus appears that at the time when defendant made the agreement of June 6, 1912, the plaintiff was not in a position to have recovered substantial damages growing out of breach of the covenant contained in defendant's deed to the plaintiff, but she was in a position to have recovered at least nominal damages, and there existed a contingent liability to pay the full amount of the judgment upon its satisfaction, by payment by the plaintiff. [3] This direct liability upon the covenant contained in the deed was extinguished by plaintiff's acceptance of the subsequent agreement made by Bennett, and, in our opinion, this constituted a sufficient consideration for the agreement as made. Upon the execution of this agreement the right of the plaintiff to have the judgment satisfied by the defendant became absolute and was no longer contingent upon prior satisfaction of the judgment by the plaintiff. [4] The defendant having failed to perform that agreement, he thereupon became liable to the plaintiff for the amount of the judgment as damages for breach of his agreement.

The judgment is reversed.

Shaw, J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 22, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 21, 1919.

All the Justices concurred.

[Civ. No., 2701. First Appellate District, Division Two.—February 21, 1919.]

FELIX ONDANCK, Appellant, v. SOUTHERN PACIFIC COMPANY et al., Respondents.

[1] **WORKMEN'S COMPENSATION ACT—AWARD OF COMPENSATION FOR INJURIES—SUBSEQUENT ACTION AGAINST NEGLIGENT PARTY—EMPLOYER AND INSURANCE CARRIER REFUSING TO JOIN—EMPLOYEE SUING ALONE.**—After an award by the Industrial Accident Commission to an injured employee, and payment by the employer's insurance carrier, the injured employee may maintain an action alone against the party whose negligence caused the injury, where the employer and his insurance carrier refuse to join as plaintiffs by making them parties defendant.

APPEAL from a judgment of the Superior Court of Santa Cruz County. Benj. K. Knight, Judge. Reversed.

The facts are stated in the opinion of the court.

Charles B. Younger for Appellant.

Chas. M. Cassin and James L. Atteridge for Respondent Southern Pacific Company.

HAVEN, J.—Plaintiff sued to recover damages for injuries received by him through the negligence of defendant Southern Pacific Company in shunting a car into a truck of lumber, which plaintiff was engaged in moving in the course of his employment by the defendant San Vicente Lumber Company. After the accident, plaintiff received from his employer medical and surgical attendance, and from the employer's insurance carrier, the defendant Guardian Casualty and Guaranty Company, sixty-five per cent of his average weekly earnings from the time of the accident until a few days before the commencement of the action, which latter payment is alleged to have been made pursuant to an award by the Industrial Accident Commission. Subsequent to that award, the plaintiff requested his employer and its insurance carrier to join him in the institution of this action, but both of said defendants refused to so join. The action was then commenced by the injured employee as sole plaintiff. All of the defendants de-

murred to the complaint. Their demurrers were sustained without leave to amend and judgment was thereupon entered in favor of defendants from which plaintiff appeals.

[1] The question presented for determination is the same as that involved in the action of *Hall v. Southern Pacific Co.*, *post*, p. 39, [180 Pac. 20]. In this case the action is by the injured employee, while in the Hall case the employee was killed and the action was brought by his heirs at law. Here an insurance carrier made certain payments and is joined as a defendant for that reason, which fact did not appear in the Hall case. These differences of facts do not differentiate the question involved upon the appeal. For the reasons given in the opinion in the Hall case, it must be held that plaintiff was entitled to maintain this suit as sole plaintiff, upon joining his employer and the latter's insurance carrier as defendants, and, for that reason, the demurrers of defendants to plaintiff's complaint were erroneously sustained.

It is therefore ordered that the judgment be reversed, with instructions to the trial court to overrule the demurrers to plaintiff's complaint.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 21, 1919.

All the Justices concurred.

[Civ. No. 2705. First Appellate District, Division Two.—February 21, 1919.]

BETTY T. HALL et al., Appellants, v. SOUTHERN PACIFIC COMPANY (a Corporation), et al., Respondents.

[1] WORKMEN'S COMPENSATION ACT—AWARD TO INJURED EMPLOYEE—SUBSEQUENT ACTION BY EMPLOYEE AGAINST TORT-FEASOR—PARTIES—JOINDER OF EMPLOYEE WITH EMPLOYER OR INSURANCE CARRIER.—An injured employee, after having made claim and received an award against his employer under the Workmen's Com-

pensation Act, may join as party plaintiff with his employer or the latter's insurance carrier in a suit against a third party whose tort caused the injuries complained of.

- [2] **ID.—EMPLOYER REFUSING TO JOIN AS PLAINTIFF—INJURED EMPLOYEE SUING ALONE.**—Upon the refusal of the employer to join as plaintiff in such a suit, the injured employee may sue alone, by joining the employer as a defendant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge. Reversed.

The facts are stated in the opinion of the court.

Keyes & Erskine for Appellants.

A. L. Clark, Henley C. Booth, Edwin T. Cooper and H. K. Bells for Respondents.

HAVEN, J.—This action was brought to recover damages for the death of Lucius Endicott Hall, Jr., which is alleged to have been caused by the negligence of the defendant, Healy-Tibbitts Construction Company. Plaintiffs are the surviving widow and minor child of said deceased. At the time of the accident which caused his death the deceased was employed by the defendant Southern Pacific Company as a pile inspector and construction engineer, and was performing services growing out of and incidental to such employment. After his death the plaintiffs filed a lawful claim against the defendant Southern Pacific Company for compensation for such death under the provisions of the Workmen's Compensation, Insurance and Safety Act (Stats. 1913, p. 279). Upon that claim the Industrial Accident Commission made an award in favor of the plaintiffs and against the defendant, Southern Pacific Company, requiring payment by that company to plaintiffs of compensation in weekly installments; the total liability of the said defendant upon such award being five thousand one hundred dollars. After the making of such award, the plaintiffs requested the defendant Southern Pacific Company to commence an action against the defendant Healy-Tibbitts Construction Company to recover damages for the death of said deceased, with the further request that the excess of any amount which might be recovered in such suit, over the liabil-

ity of the defendant Southern Pacific Company to plaintiffs under the award, be paid to plaintiffs. The said defendant Southern Pacific Company refused to bring such action, whereupon this action was brought by plaintiffs, and the Southern Pacific Company was joined as a party defendant. The prayer is for judgment for the sum of fifty thousand dollars "in favor of the Southern Pacific Company, for the use of the plaintiffs."

To plaintiffs' complaint, alleging substantially the above-recited facts, the defendants filed separate demurrers, both of which were sustained. Plaintiffs declining to amend, judgment was entered against them, from which they appeal. The sole question presented is whether or not plaintiffs can maintain this action against a third party, whose negligence is alleged to have caused the death, after having made claim against the employer of the deceased for compensation under the provisions of the Workmen's Compensation Act, and received an award on such claim.

The answer to that question depends on the proper construction to be given to section 31 of the act referred to, which, as far as is here material, reads as follows:

"The making of a lawful claim against an employer for compensation under this act for the injury or death of his employee shall operate as an assignment to the employer of any right to recover damages which the injured employee, or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party . . . but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employee or other person entitled."

In the case of *Marcel Bassot and The Ocean Accident & Guarantee Corporation v. United Railroads of San Francisco*, 39 Cal. App. 60, [177 Pac. 884], recently decided by Division One of this court, suit was brought by an injured employee and his employer's insurance carrier jointly against the defendant corporation to recover damages caused by the latter's alleged negligence. The compensation due the employee under the Workmen's Compensation Act had been adjusted and paid by the insurance company; after which both joined as plaintiffs

against the third party whose negligence was alleged to have been the cause of the injuries received. A motion for nonsuit was granted as against the plaintiff employee on the ground that he was improperly joined as a party plaintiff. The case was twice heard in the district court of appeal, and in both opinions the granting of such nonsuit was held to have been erroneous. In the decision on rehearing the court, in referring to section 31 of the above act, and adopting the language of the original opinion, says:

"Respondent is correct in its contention that this section operates to transfer the legal title to the claim for damages to the employer or his surety, but it is also true that the employee still retains an equitable interest therein as to any surplus that may be recovered over the amount paid him by the employer, and he is therefore a real party in interest in the litigation. Although section 369 of the Code of Civil Procedure provides that 'a trustee of an express trust may sue without joining the person for whose benefit the action is prosecuted,' section 378 of that code provides that 'all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title.' There is ample authority in this state to the effect that the provisions of section 369 are permissive only, and that the beneficiary of the trust may properly be joined as a party plaintiff with the trustee by virtue of section 378. (*Daley v. Cunningham*, 60 Cal. 530; *Cerf v. Ashley*, 68 Cal. 419, [9 Pac. 658].) It therefore follows that, while Bassot was not a necessary party to the suit, he was at all events a proper party thereto, and that the lower court was in error in granting the motion for a nonsuit and dismissing the action as to him."

A petition to have the above case heard and determined by the supreme court, after judgment in this court, was denied by the supreme court on January 30, 1919. We are in entire accord with the construction of the statute announced in the above case. [1] If we were not, we should be bound to consider that the opinions referred to, and the refusal of the supreme court to disturb the same, establish the law in this state to the effect that an injured employee, after having made claim and received an award under the Workmen's Compensation Act, may join as a party plaintiff with his employer, or

the latter's insurance carrier, in a suit against a third party whose tort has caused the injury complained of.

[2] The only remaining question in this case is whether, upon the refusal of the employer to join as plaintiff in such a suit, the injured employee, or the heirs at law of a deceased employee, may maintain the action alone by joining the employer as a defendant. If such power does not exist, the right of the injured employee, or the heirs of the deceased employee, to protect their equitable interest in the surplus that may be recovered for their benefit, can easily be destroyed by the refusal of the employer to join as plaintiff. In such event, the plaintiffs in this action, having an established right to sue, would be denied that right by reason of the refusal of their trustee to protect their interests. The necessity of preventing such a denial of justice on broader grounds is obviated by the provisions of section 382 of the Code of Civil Procedure: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

Plaintiffs complied with this section and, by virtue of its provisions, are entitled to maintain the action as sole plaintiffs.

The judgment must be reversed, with instructions to the trial court to overrule the demurrers to plaintiffs' complaint, and it is so ordered.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 21, 1919.

All the Justices concurred.

[Civ. No. 2290. Second Appellate District, Division One.—February 21, 1919.]

NELLIE M. FORRINGTON, Respondent, v. COUNTY OF
SAN LUIS OBISPO, Appellant.

[1] **SALARY—ACTION FOR — COMMISSIONER AT EXPOSITION — DURATION OF EMPLOYMENT.**—In this action against a county to recover three months' salary, claimed as an employee of the county under the designation of commissioner for the county at the Panama-Pacific International Exposition of 1915, the evidence is held sufficient to support the finding that the plaintiff was employed for a definite period including the three months in question.

APPEAL from a judgment of the Superior Court of San Luis Obispo County. J. A. Bardin, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Charles A. Palmer, District Attorney, and L. A. Enos, Assistant District Attorney, for Appellant.

Lamy & Putnam for Respondent.

CONREY, P. J.—The defendant appeals from the judgment, which covers three months of salary claimed by the plaintiff as an employee of the county of San Luis Obispo, under the designation of commissioner for the county at the Panama-Pacific International Exposition in 1915; being at the rate of \$150 per month, for the months of July, August, and September, 1915.

A typewritten clerk's transcript on appeal and a typewritten transcript of the phonographic report of the trial have been filed. Appellant has not caused to be printed with its brief, or as a supplement thereto, any part of the record, but has made a narrative statement of the pleadings. The brief for appellant discusses, without quotation thereof, certain items of evidence, which fall under the claim that the evidence was insufficient to justify the decision.

By certain evidence printed in respondent's brief, we learn that by resolution of the board of supervisors, three "commissioners" were selected, "to represent the county in collect-

ing and installing an exhibit of the resources of the county at the Panama-Pacific International Exposition, *and maintaining the same during the exposition year.*"

Appellant contends that the employment of respondent was not for a specified term, and that therefore it was terminable upon notice or at the will of the employer. It also claims that the board of supervisors did, by resolution of June 8, 1915, terminate plaintiff's employment. The briefs do not contain any copy of that supposed resolution. It should have been presented in printed form if counsel desired to bring it to the attention of the court. (Code Civ. Proc., sec. 953c; *Hepler v. Wright*, 35 Cal. App. 567, 575, [170 Pac. 667]; *Jones v. American Potash Co.*, 35 Cal. App. 128, [169 Pac. 397].)

[1] The omission above mentioned, however, is not very important; for we think that the evidence quoted in respondent's brief, as above noted, is sufficient to support the court's finding that plaintiff's employment was for a definite period, including the months covered by the demand made in this action. It is not denied by counsel for appellant that if the liability exists, the amount of the judgment is correct; they admit that (prior to the time of plaintiff's acceptance of the employment), the salary of plaintiff was by resolution fixed at the monthly rate of \$150, "from January 15, 1915, to December 15, 1915."

The judgment is affirmed.

Shaw, J., and James, J., concurred.

[Civ. No. 2040. Second Appellate District, Division Two.—February 21, 1919.]

JUSTIN HAMMOND et al., Respondents, v. E. L. HAZARD et al., Appellants.

- [1] **APPEAL—DENIAL OF NEW TRIAL—CODE AMENDMENT—DISMISSAL OF APPEAL.**—An attempted appeal from an order denying a motion for new trial, taken after the amendment of 1915 to section 963 of the Code of Civil Procedure, must be dismissed.
- [2] **NEGLIGENCE—AUTOMOBILE COLLISION—ACTION FOR PERSONAL INJURIES—VERDICT FOR PLAINTIFFS SUSTAINED BY EVIDENCE.**—In this

action by husband and wife against two defendants for personal injuries sustained by the wife in an automobile collision, the evidence from the typewritten transcript, so far as printed in the briefs, is found sufficient to support the verdict of the jury in favor of the plaintiffs against both defendants.

- [3] **ID.—IMPLIED FINDINGS—OWNERSHIP OF CAR AND AGENCY OF DRIVER.** In such case the evidence was also sufficient to sustain the implied finding that the female defendant who occupied the car with the driver was the owner of the car, and the driver was her agent.
- [4] **ID.—EVIDENCE OF OWNERSHIP—CONDUCT—ADMISSIONS.**—The conduct of the female defendant in busying herself with the names of witnesses and making statements referring to the car as "my car" etc., and stating that she would "settle all damages," together with the fact, admitted on the trial, that the car was registered under her name, was amply sufficient to justify the jury in disbelieving the direct evidence of both defendants that she was not the owner of the car.
- [5] **ID.—REGISTRATION UNDER MOTOR VEHICLE ACT.**—The Motor Vehicle Act (Stats. 1913, p. 641, secs. 3, 4), requiring the owner of every automobile to cause an application for registration to be filed in the name of the owner, warrants a finding that the person in whose name an automobile is registered is in fact the rightful owner.
- [6] **APPEAL—ALTERNATIVE METHOD—DUTY OF APPELLATE COURT AS TO EXAMINATION OF THE TYPEWRITTEN DOCUMENTS.**—The alternative method of appeal, though permitting the filing of a typewritten transcript, casts no burden upon appellate courts to examine the typewritten documents.
- [7] **ID.—VARIANCE—INSUFFICIENT RECORD—QUESTION NOT DETERMINED.** On this appeal taken under the alternative method, the appellants claiming a variance between the complaint which alleged "willfulness" and the proof which appellants claim was of "negligence," and the appellants having failed to print in their briefs a sufficient record, it cannot be determined whether the evidence fell short of establishing willfulness on the part of appellants.
- [8] **NEGLIGENCE—AUTOMOBILE ACCIDENT—PERSONAL INJURIES—OWNERSHIP OF CAR—EVIDENCE—OBJECTION PROPERLY OVERRULED.** In this action for damages for injuries sustained in an automobile collision there was no error in overruling an objection to a question to a witness, who, being asked if at the time of the collision he heard the female defendant make any statement with reference to the accident, answered that she said: "My car is hurt just as much as the other car," since it was for the jury to say on a consideration of all the evidence whether in using the words "my car" she referred to the matter of ownership, or was simply making a comparison of the damage to the respective cars.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Affirmed.

The facts are stated in the opinion of the court.

G. R. Freeman for Appellants.

E. R. Simon for Respondents.

FINLAYSON, P. J.—This is an action for personal injuries to the plaintiff Adel Hammond, caused by a collision of the automobile that defendant Hazard was driving—alleged to be the property of the defendant Cronkhite—with the automobile that plaintiff Justin Hammond was driving, and in which his wife, Adel Hammond, was riding with him.

While plaintiffs, in the automobile in which they were riding, were ascending a narrow mountain road between San Diego and El Centro, in Imperial County, on November 5, 1914, the automobile that the defendant Hazard was driving—on the front seat of which Mrs. Cronkhite sat—collided, at a curve in the road, with the automobile in which plaintiffs were riding, breaking Mrs. Hammond's arm and causing her serious injuries. The trial, which was before a jury, resulted in a verdict in favor of plaintiffs against both defendants. From the judgment and an order denying their motion for new trial defendants appeal.

[1] Notice of the attempted appeal from the order denying defendants' motion for a new trial having been filed after the amendment of 1915 to section 963 of the Code of Civil Procedure, the appeal attempted to be taken from that order must be dismissed.

It is alleged in the complaint that the automobile in which defendants were riding was the property of defendant Cronkhite and that defendant Hazard was operating it at the time of the accident with her consent and as her agent. Upon this allegation the answer joined issue, and the principal point urged on the appeal is that the evidence is insufficient to justify a verdict against Mrs. Cronkhite for the reason that, so it is argued, the evidence is insufficient to justify the jury's implied finding that she owned the automobile that Hazard was driving and that the latter was operating it as her agent.

Both defendants testified that the automobile was not the property of Mrs. Cronkhite. Defendant Hazard testified that about June 28, 1913, it was purchased from or through the Crown Garage & Machine Works by one Stansbury, upon whose ranch he was working as foreman; that on the day of the alleged sale to Stansbury, Mrs. Cronkhite gave to the Crown Garage & Machine Works her personal check for \$575, and that when she gave this check he said to her: "This is your car until I give you back your money."

[2] Though the record is somewhat voluminous, the facts presently to be referred to, together with those already mentioned, constitute the substance of all the evidence printed in the briefs relative to the questions of ownership and agency, notwithstanding the appeal was taken under the alternative method and it is incumbent upon appellants to print in their briefs, or in a supplement thereto, so much of the record as is necessary to enable us intelligently to pass upon the questions presented. (Code Civ. Proc., sec. 953c.)

[3] There was sufficient evidence to support the verdict and the jury's implied finding that, at the time of the accident, Hazard was driving the car as the agent of Mrs. Cronkhite. If Mrs. Cronkhite owned the car, then the fact that she was sitting on the front seat with Hazard while he drove, apparently acquiescing in its operation by him, was amply sufficient to justify the inference that the agency, as alleged in the complaint, existed. So that the sufficiency of the evidence to justify a finding of agency depends upon its sufficiency to justify a finding that the car was the property of Mrs. Cronkhite. That the evidence was sufficient to justify such a finding we have no doubt. Though Hazard gave direct testimony as to the ownership of the car, and testified that it did not belong to Mrs. Cronkhite, nevertheless the jurors were justified in disbelieving this part of his testimony, for the reason that discredit was cast upon it by the evidence of an impeaching witness produced in rebuttal by respondents, one Kemp, who testified that on the day after the accident Hazard told him that "he did not want to get Mrs. Cronkhite mixed up in this, as she has furnished the car." Hazard admitted that when Mrs. Cronkhite gave the Crown Garage & Machine Works her personal check for \$575—this was at the time when he says he purchased the car for Stansbury from the Crown

Garage & Machine Works—he may have said to her: “This is your car until I give you back your money.” Mrs. Cronkhite likewise gave direct testimony that she did not own the car. [4] But, according to the testimony of witnesses for respondents, she declared, at the time of the accident, that she would “settle all damages.” According to respondents’ witnesses, Mrs. Cronkhite, immediately after the collision, took the names of witnesses to the accident, while Hazard sat in the car apparently indifferent; and, at the same time, she made the statement: “My car is hurt just as much as the other car.” Her conduct in thus busying herself with the names of witnesses, and her statements about “my car,” and that “I will settle all damages,” clearly evidence the interest of one who is conscious of liability as the owner of the car. This, in connection with the fact, admitted at the trial, that the car was registered in her name for the year 1914, was amply sufficient to justify the jury in disbelieving the direct evidence of herself and Hazard that she was not the owner of the car on November 5, 1914, the day of the accident. [5] The Motor Vehicle Act requires the owner of every automobile to cause an application for registration to be filed, and the automobile to be registered, in the name of the owner. (Stats. 1913, p. 641, secs. 3, 4.) Such legislation warrants a finding that the person in whose name an automobile is registered is in fact the rightful owner. (*Commonwealth v. Sherman*, 191 Mass. 439, [78 N. E. 98]; *Ferris v. Sterling*, 214 N. Y. 249, Ann. Cas. 1916D, 1161, and note on p. 1163 et seq., [108 N. E. 406].)

For the foregoing reasons we hold that the evidence, as disclosed by such parts of the record as have been printed in the briefs, was sufficient to justify the verdict. It is possible that there may be evidence in the record which, if printed in appellants’ brief, and thus properly called to our attention, would necessitate a different conclusion. [6] The alternative method of appeal, though permitting parties to file typewritten transcripts of the evidence, casts no burden upon appellate courts to examine the typewritten documents. (*California Sav. etc. Bank v. Canne*, 34 Cal. App. 768, [169 Pac. 395].)

[7] It is next contended that there is a fatal variance between the case alleged in the complaint and the proof, in that—so it is argued—the complaint alleges “willfulness” and

the evidence shows only "negligence"—citing in support of this contention *Tognazzini v. Freeman*, 18 Cal. App. 468, [123 Pac. 540], where the distinction between "willfulness" and "negligence" is clearly pointed out. Assuming, for the purpose of this decision only, that the complaint tendered an issue of willfulness only, and not negligence—an assumption which, we think, is not borne out by the language of the pleading—nevertheless, we have no means of knowing whether the evidence fell short of establishing willfulness on the part of appellants, since they have failed to print in their briefs a sufficient record. Where, as here, the appeal is taken under the alternative method, "the law requires . . . that enough must be printed [in the briefs or in a supplement thereto] to illustrate the points made and to enable the court to determine those points." (*California Sav. etc. Bank v. Canne, supra*. See, also, *McLaren v. Hards*, 39 Cal. App. 104, [178 Pac. 332]; *Lutz v. Merchants' Nat. Bank*, 179 Cal. 401, [177 Pac. 158].)

[8] There was no error in overruling the objection to the question propounded to the witness Fuller, who, being asked if, at the time of the collision, he heard Mrs. Cronkhite make any statement with reference to the accident, answered that she said: "My car is hurt just as much as the other car." It was for the jury to say, from a consideration of all the evidence, whether, in using the words "my car," Mrs. Cronkhite referred to the matter of ownership or was simply making a comparison of the damage to the respective cars.

Finding no reversible error disclosed by any of the record printed in the briefs, we are of the opinion that the judgment should be affirmed, and the appeal from the order denying a new trial dismissed.

It is ordered accordingly.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 2581. First Appellate District, Division One.—February 24, 1919.]

MARGARET M. SALLEE, Appellant, v. UNITED RAILROADS OF SAN FRANCISCO (a Corporation), Respondent.

- [1] **NEGLIGENCE — STREET RAILWAY — PEDESTRIAN — ROPE DANGLING FROM TROLLEY.**—The act of a street railway company in operating a trolley-car upon and across a crowded thoroughfare with the trolley rope at its rear swinging in a loop which rendered it liable to strike and catch and cast down pedestrians passing behind such car was in and of itself a negligent act.
- [2] **ID.—MOTION FOR NONSUIT—KNOWLEDGE OF DEFENDANT—RES IPSA LOQUITUR.**—Assuming that against a motion for nonsuit the plaintiff was required to furnish as a link in the chain of proofs sufficient to make out a *prima facie* case proof that the defendant knew that the rope was dangling or that the officials of the defendant knew it, she was entitled to rely on the doctrine of *res ipsa loquitur* to supply that link.
- [3] **ID.—APPLICABILITY OF DOCTRINE.**—The doctrine of *res ipsa loquitur* is applicable to cases of collisions between street-cars and pedestrians.
- [4] **ID.—EVIDENCE OF NEGLIGENCE.**—In this action there was sufficient evidence of negligence; the appliance was shown to be under the management of the defendant or its servants; the accident was such as in the ordinary course of things could not happen where those in the immediate charge and control of the appliance use proper care; and these facts afford sufficient evidence, in the absence of explanation by the defendant, that the accident occurred through the want of proper care on the part of the defendant or its employees.
- [5] **ID.—PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.**—In this action there was sufficient evidence that the striking of the plaintiff by the swinging loop of the trolley rope was the proximate cause of her injuries, and to have entitled the case to be passed upon by the jury, while there was no such evidence of contributory negligence upon the plaintiff's part to have warranted the court in withholding the case from the jury on that ground as matter of law.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge. Reversed.

The facts are stated in the opinion of the court.

Sullivan & Sullivan and Theo. J. Roche for Appellant.

Wm. M. Abbott, Wm. M. Cannon and Kingsley Cannon for Respondent.

RICHARDS, J.—This is an appeal from a judgment in the defendant's favor after an order granting its motion for nonsuit in an action for damages for personal injuries. The plaintiff alleged that her injuries occurred while she was walking on the southerly side of Market Street to the Ferry building in the city and county of San Francisco, and was in the act of crossing the car tracks of the defendant on East Street at its intersection with the said southerly line of Market Street, and that the accident occasioning her injuries happened in this wise: One of the cars of the defendant operated by its employees was in the act of passing along said East Street northerly on to Market Street; the said plaintiff waited until said car had passed before attempting to cross the tracks behind it; the defendant, through its employees operating said car, had negligently permitted the trolley rope to hang loose and swing out from the rest of the car in a semi-circle, one end being attached to the trolley and the other to the car. The fact that said trolley rope was swinging loose from said trolley and was endangering the lives or safety of people passing behind said car was known to said defendant at said time and to the servants of said defendant who were operating said car. As the plaintiff was in the act of passing behind said car without observing said swinging rope she was struck and caught by said rope about her neck and violently thrown down and was thereby severely injured. The defendant by its answer denied the said alleged negligent acts on its part, and pleaded contributory negligence on the part of the plaintiff. The plaintiff, both by her own testimony and that of her supporting witnesses, offered evidence tending to prove the foregoing averments of her complaint save and except the averment that the fact that the said trolley rope was swinging loose in the manner stated in her complaint was known to the defendant or its employees at the time of said accident. At the conclusion of the plaintiff's testimony the defendant moved for a nonsuit upon the ground, first, that the evidence failed to show negligence on the part of the defendant; second, that the evidence showed contributory negligence on the part

of the plaintiff, and, third, that the evidence failed to show any proximate connection between the alleged negligence of the defendant and the injuries complained of. The court granted said motion upon the express ground that there was no evidence "that the defendant knew that the rope was dangling or that the officials of the company knew it."

The sole question presented by the appellant upon this appeal is as to whether such proof was necessary on the plaintiff's part in order to make out her case, the contention of the appellant being that this is one of the class of cases to which the doctrine of *res ipsa loquitur* is to be applied, and that the presumption of negligence arising from its application would be sufficient to make out the plaintiff's case as against a motion for nonsuit. The respondent resists this contention upon two asserted grounds—first, that the doctrine of *res ipsa loquitur* does not apply to cases involving collisions between street-cars and pedestrians; and, second, that if it does have such application, it is limited to cases where the duty of extreme care devolves on the defendant by reason of the dangerous nature of the instrumentality through the operation of which the injury occurs.

After a careful review of the facts of this case as presented by the plaintiff's proofs we are not satisfied that the exigencies of her case required recourse to the doctrine of *res ipsa loquitur* in order to escape a nonsuit. [1] The act of the defendant in operating a trolley-car upon and across a crowded thoroughfare with the trolley rope at its rear swinging in a loop which rendered it liable to strike and catch and cast down pedestrians passing behind such car was in and of itself a negligent act. The conductor of the car was charged with the duty of adjusting from time to time its trolley by means of this trolley rope, and of fastening the latter after each of such adjustments so that it would not swing loose and thereby menace the safety of pedestrians passing behind and in proximity to the moving car. It was his failure to perform this duty which led directly to the plaintiff's contact with the rope and consequent fall and injuries. To hold upon such a state of facts that the plaintiff had cast upon her the further burden of proving that the conductor knew that he had been negligent would be to require something which the plaintiff, in most cases at least, could never supply. [2] Assuming, however, that the plaintiff was required to furnish this link in the

chain of proofs sufficient to make out a *prima facie* case, we are of the opinion that she was entitled to rely on the doctrine of *res ipsa loquitur* to supply that link. [3] We disagree with the respondent's first contention that this doctrine has no application to cases of collisions between street-cars and pedestrians, and find ourselves supported in that view by the following authorities, in each of which the action was similar in character and parties to the instant case: *Dillar v. Northern Cal. Power Co.*, 162 Cal. 531, [Ann. Cas. 1913D, 908, 123 Pac. 359]; *Uggla v. West End Street Ry. Co.*, 160 Mass. 351, [39 Am. St. Rep. 481, 35 N. E. 1126]; *Toby v. Scranton Ry. Co.*, 245 Fed. 365; *Hull v. Berkshire St. Ry. Co.*, 217 Mass. 361, [104 N. E. 747]; *Washington v. Rhode Island Co.* (R. I.), 70 Atl. 913; *Haynes v. Raleigh G. L. Co.*, 114 N. C. 203, [41 Am. St. Rep. 786, 26 L. R. A. (N. S.) 810, 19 S. E. 344]; *Cincinnati Tr. Co. v. Holzenkamp*, 74 Ohio St. 379, [113 Am. St. Rep. 980, 6 L. R. A. (N. S.) 800, 78 N. E. 529]; *Jones v. Union Ry. Co.*, 18 App. Div. 267, [46 N. Y. Supp. 321].

The rule as stated in *Shearman & Redfield on Negligence* (fifth edition), section 59, does not recognize the exception which the respondent contends for, but states generally the doctrine as follows: "Proof of an injury, occurring as the proximate result of an act of the defendant, which would not usually, if done with due care, have injured anyone, is enough to make out a presumption of negligence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

An illuminating case touching the proper application of the doctrine of *res ipsa loquitur* is the case of *Delaware etc. Co. v. Dix*, 188 Fed. 901, [110 C. C. A. 535], wherein the court, in defining and applying the rule, and after stating the facts which the plaintiff in that case had proved, proceeds to state: "Unless, then, the plaintiff was required to go further and show that the defendant knew, or ought to have known, that the car door was loose, then the motion for a nonsuit was properly refused, as also the motion for judgment *non obstante veredicto*. Under the doctrine, therefore, of *res ipsa loquitur*,

was the plaintiff required to prove more? That doctrine is clearly stated by Wigmore, in his work on Evidence (volume 4, section 2509) as follows: "With the vast increase in modern times of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed 'accident' by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. '*Res ipsa loquitur*' is the phrase appealed to as symbolizing the argument for such a presumption. In England a rule of that sort has been conceded to exist for a generation, for some classes of cases at least. In the United States the presumption has spread rapidly, although with much looseness of phrase and indefiniteness of scope. . . .

" '*Res ipsa loquitur*,' the thing speaks for itself, symbolizes that the occurrence of the injury raises a presumption of culpability on the part of the owner or manager of the apparatus, because in cases where it applies powerful and dangerous agencies in the control of one will do harm unless properly constructed or managed, and also because the evidence of the cause of the injury, whether innocent or blameworthy, is in the possession of or accessible to the person constructing or operating, and not accessible to the other party. Erle, C. J., in *Scott v. London & St. K. Docks Co.*, 3 Hurl. & C. 596, [159 Eng. Reprint, 665] (injury to a passer-by from the falling of goods from a train), said:

" 'There must be reasonable evidence of negligence, but, when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen when those who have the management use proper care, it affords evidence in the absence of explanation by the defendant that the accident came through want of care.'

"How completely this applies to the case at bar. Such an accident would not happen in the ordinary use of a refrigerator-car, unless the defendant was negligent in permitting it to have its door open with an extending lever. It had in its possession the evidence by which it might be explained."

[4] In the instant case, as in the case last above quoted, there was reasonable evidence of negligence; the appliance

was shown to be under the management of the defendant or its servants; the accident was such as in the ordinary course of things could not happen when those in the immediate charge and control of the appliance use proper care. These facts, in our opinion, afford sufficient evidence, in the absence of explanation by the defendant, that the accident occurred through the want of proper care on the part of said defendant or its employees. This being so, the trial court was in error in granting the defendant's motion for nonsuit for the want of the link in the plaintiff's case which the application of the doctrine of *res ipsa loquitur* supplied.

[5] As to the other points urged by the respondent, no extended discussion is required. There is sufficient evidence that the striking of the plaintiff by the swinging loop of the trolley rope was the proximate cause of her injuries to have entitled the case to be passed upon by the jury. There was no such evidence of contributory negligence upon the plaintiff's part to have warranted the court in withholding the case from the consideration of the jury upon that ground as a matter of law.

No other reason being urged by the respondent as a justification of the order of the trial court granting a nonsuit and for its judgment based thereon, it follows that said order was erroneous, and, hence, that the judgment must be reversed. It is so ordered.

Waste, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 26, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 21, 1919.

Melvin, J., dissented.

[Civ. No. 2729. First Appellate District, Division Two.—February 25, 1919.]

GEORGE L. HAMER, Appellant, v. MRS. W. J. ELLIS,
Respondent.

- [1] **PLEADING—DEMURRER TO AMENDED COMPLAINT SUSTAINED—REFUSAL OF FURTHER AMENDMENT—ERROR.**—Although an amended complaint was the third attempt of the pleader to state a cause of action, it was error, upon sustaining a demurrer thereto, to refuse to allow a further amendment, unless it was clear to the trial court that it could not be amended so as to obviate the objections made thereto.
- [2] **LANDLORD AND TENANT—EVICTION—GENERAL DEMURRER.**—In this action by a tenant for damages, pleaded in two counts, it is held that a cause of action is stated in the complaint which is good as against a general demurrer.
- [3] **ID.—TERMINATION OF LEASE—DESTRUCTION OF BUILDINGS.**—A lease of land with buildings thereon is not terminated by the destruction of the buildings, unless it is so provided by contract or by statute.
- [4] **ID.—DESTRUCTION OF "THING HIRED"—LAND WITH SEVERAL STRUCTURES THEREON.**—Although under section 1933 of the Civil Code the hiring of a thing terminates with the destruction of the thing hired, that result may not follow the destruction of a building where leased land has several structures thereon, since the building destroyed may not have been the "thing hired."
- [5] **ID.—EVICTION—DAMAGES—FUTURE PROFITS.**—An eviction entitles the plaintiff in an action therefor to recover any damage he may have suffered thereby, including loss of future profits if ascertainable with reasonable certainty.
- [6] **ID.—PLEADING SPECIAL DAMAGES—OTHER DAMAGE NOT PRECLUDED.** The pleading of special damage from loss of future profits does not preclude the recovery of any other damage sustained.
- [7] **ID.—DAMAGE BY ELEMENTS—COVENANT TO REPAIR.**—A covenant to repair in case of extensive damage by the "elements" does not include rebuilding structures destroyed by fire, "damage by the elements" being the equivalent of the phrase "act of God," such as lightning or other superhuman agency.

APPEAL from a judgment of the Supreme Court of Mendocino County. J. Q. White, Judge. Reversed.

The facts are stated in the opinion of the court.

Lilburn I. Gibson for Appellant.

Preston & Preston for Respondent.

HAVEN, J.—Defendant's demurrer to plaintiff's second amended complaint was sustained without leave to amend; whereupon judgment was entered for defendant, from which plaintiff appeals. Plaintiff was lessee, and defendant lessor, under a written lease of certain premises in the city of Ukiah. The second amended complaint contains two counts: The first, for damages alleged to have been suffered by plaintiff by reason of his wrongful eviction by defendant from the leased premises; and the second, for damages alleged to have been suffered by plaintiff by reason of the breach by defendant of a covenant of the lease to repair the buildings therein referred to. In the first count the leased premises are described as follows: "That certain property known as the Ellis Stable Property, situated on the east side of Main Street between Perkins Street and Stephenson Street, in the Town of Ukiah City, Mendocino County, State of California, and including the stable building and all sheds attached thereto, together with the corralls, scales and all other property belonging to or forming a part of said premises, excepting what is known as the 'Back Shed' on the northeast portion of said premises, being 15 feet on Perkins Street and running back 25 feet."

In the second count the same description is given, but the following allegation is added: "And plaintiff here alleges that said premises consisted of one corral, 150 feet long by 90 feet wide; one barn 150 feet long by 60 feet wide; one shed 40 feet long by 24 feet wide; scales 30 feet long by 10 feet wide, all of which were built upon the ground and the ground constituted the only floor of each thereof; and an alleyway 24 feet long by 16 feet wide."

The allegations of the first cause of action are substantially the following: A lease of the above-described premises was executed by defendant to plaintiff on October 5, 1914, for a term of five years, at a monthly rental of thirty dollars; it was understood and agreed between the parties to said lease that said premises were to be used as a livery and feed stable, storage sheds, stock corrals, and weighing depot; plaintiff entered into possession of said premises on October 5, 1914, and engaged in the business above referred to; said lease continued

in effect until July 5, 1917, upon which date defendant notified plaintiff that the said lease was of no further force or effect, and that said plaintiff had no further right on said premises, and would no longer be allowed possession thereof, nor to go on said property; plaintiff notified defendant on said date that he was ready, willing, and able to perform his part of said contract, and tendered the defendant the rent for the month ending on August 5, 1917, which was refused by defendant; on August 5, 1917, defendant took possession of said premises, and thereafter erected a building on a part thereof and let the same to another tenant and also repaired the scales thereon, and has since operated them at a profit; as a result of said eviction plaintiff has not entered on said premises since July 5, 1917. Then follow allegations as to the amount of profits which plaintiff had derived from the use of the premises prior to June 18, 1917, "when said premises were damaged by fire," and as to the amount of profits which would have been derived therefrom during the remainder of the term of the lease. The concluding allegation of the first count is: "And, therefore, because of this eviction as hereinabove set forth, plaintiff has been damaged to the extent of \$2,700."

The demurrer was to the whole complaint, and to each cause of action separately, for failure to state facts sufficient to constitute a cause of action; and, specially, on several alleged grounds of uncertainty, ambiguity, and unintelligibility.

[1] Unless it was clear to the trial court that the allegations contained in the first count did not state a cause of action, and could not be amended so as to obviate the objections made thereto, the refusal to allow a further amendment was error. (*Payne v. Baehr*, 153 Cal. 447, 448, [95 Pac. 895]; *Schaake v. Eagle etc. Can Co.*, 135 Cal. 480, [63 Pac. 1025, 67 Pac. 759].) In the case last cited it is said: "We do not say that there is no limit to the right to amend when such demurrers are sustained, since several failures, perhaps but one or two, may develop a want of facts, or show that the fault cannot be remedied." [2] The complaint now under consideration is the third attempt of the pleader to state a cause of action; but, upon the face of the first count therein contained, and in the absence of the two preceding complaints which are not before us, it does not appear that any defects therein cannot be remedied. On the contrary, we are of the opinion that a cause of action is stated therein which is not obnoxious to

a general demurrer. The facts pleaded show an eviction of the lessee by the lessor, without excuse, as far as appears from the allegations of that count. (*Agar v. Winslow*, 123 Cal. 593, [69 Am. St. Rep. 84, 56 Pac. 422]; *McAlester v. Landers*, 70 Cal. 82, 83, [11 Pac. 505]; *Levitzky v. Canning*, 33 Cal. 306.)

Even if, under the rule that every reasonable presumption must be indulged in to support the ruling of the court below, we assume that the facts pleaded in the second count in the complaint now under consideration were before the court in the original complaint or the first amended complaint, it still does not appear that such eviction was justified. [3] A lease of land with buildings thereon is not terminated by the destruction of the buildings, unless it is so provided by contract or by statute. (24 Cyc. 1345; *Nashville etc. Ry. Co. v. Heikens*, 112 Tenn. 378, [65 L. R. A. 300, 79 S. W. 1038].) No such provision of the lease is pleaded. [4] The only pertinent statute to which our attention has been called is section 1933 of the Civil Code, which provides: "The hiring of a thing terminates . . . (4) By the destruction of the thing hired." When a portion of a building is leased, and the whole building is subsequently destroyed by fire, the lease is terminated. (*Ainsworth v. Ritt*, 38 Cal. 89; *Harvey v. Weisbaum*, 159 Cal. 267, [Ann. Cas. 1912B, 1115, 33 L. R. A. (N. S.) 540, 113 Pac. 656].) The same result does not always follow when a lease covers a parcel of land with several structures thereon. In such a case the section of the code cited is not controlling, unless the buildings destroyed were "the thing hired." A comparison of the property leased with that destroyed, as set forth in the second count, does not convince us that such was the fact.

[5] Such eviction entitled plaintiff to the recovery of any damage he may have suffered thereby. [6] The pleading of special damages to result from loss of future profits did not preclude the recovery of any other damage which may have been sustained. And loss of future profits could also be recovered, if ascertainable with a reasonable degree of certainty. (*Hawthorne v. Siegel*, 88 Cal. 159, 167, [22 Am. St. Rep. 291, 25 Pac. 1114]; *Lambert v. Haskell*, 80 Cal. 619, [22 Pac. 327]; *McConnell v. Corona City Water Co.*, 149 Cal. 60, [8 L. R. A. (N. S.) 1171, 85 Pac. 929]; 24 Cyc. 1135; *Clark v. Koesheyan*, 26 Cal. App. 305, 308, [146 Pac. 904].) The allegations as to

the future profits of plaintiff's business were not sufficiently definite to have enabled the court to determine whether or not they can be brought within the rule laid down by the above authorities, for which reason the special demurrer for uncertainty, directed to these allegations, was well taken. But it does not appear that this defect could not be cured by amendment.

The second cause of action is based upon a covenant in the lease, which is thus pleaded: "And that by other terms of said lease, said defendant was, in case of any extensive damage by the elements, or in case of the falling in of the roof or collapse of the building to immediately proceed to repair the same for the use of the party of the second part, who is the plaintiff herein, during the term of said lease." It is then alleged "that on June 18, 1917, said property described by the lease above referred to was damaged by an element, to wit: Fire, without the fault of either of the parties hereto and the said buildings, sheds, fences and scales, forming a part of said premises were destroyed."

[7] Appellant claims that by reason of the above covenant to repair "in case of any extensive damage by the elements," the lessor was bound to rebuild the buildings destroyed by fire. With this we cannot agree. It has been decided in this state that "damage by the elements" is the equivalent of the phrase "act of God"; and that "fire does not come within the definition of the term 'act of God,' unless it is caused by lightning or some other superhuman agency." (*Pope v. Farmers' Union etc. Co.*, 130 Cal. 141, [80 Am. St. Rep. 87, 53 L. R. A. 673, 62 Pac. 384]; *Ahlgren v. Walsh*, 173 Cal. 35, [Ann. Cas. 1918E, 751, 158 Pac. 748].) The complaint before us contains no allegation that the fire therein referred to was caused by such superhuman agency, and, without such allegation, no cause of action for breach of the covenant to repair is stated.

The judgment is reversed, with directions to the trial court to sustain the special demurrer for uncertainty to the first cause of action, and also to sustain the demurrer to the second cause of action, with leave to the plaintiff to amend his second amended complaint, if he shall be so advised.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2508. First Appellate District, Division One.—February 25, 1919.]

P. W. GARN, Respondent, v. HORACE THORWALDSON,
as Sheriff, etc., et al., Appellants.

- [1] **ASSIGNMENT FOR BENEFIT OF CREDITORS—FAILURE TO COMPLY WITH CODE SECTIONS—HOW FAR VALID.**—An assignment for benefit of creditors, though failing to comply with all the requirements of a statutory assignment prescribed by sections 3449 to 3473 of the Civil Code, is valid as against the assignor and all creditors assenting to it, and serves to vest the assignor's title to the property in the assignee. It is, at most, void only against creditors not assenting thereto and against purchasers and encumbrancers in good faith and for value.
- [2] **FRAUDULENT CONVEYANCES—SALES WITHOUT IMMEDIATE DELIVERY AND CHANGE OF POSSESSION.**—A sale of personal property, though not followed by immediate delivery and actual and continued change of possession as required by section 3440 of the Civil Code, is not a nullity, but is good against all the world except the creditors of the vendor, and is good against them except when attacked in proceedings for the collection of their debts.
- [3] **ID.—TITLE OF BUYER.**—The buyer of personal property, though the sale is not followed by immediate delivery and actual and continued change of possession, acquires good title as against all the world except creditors of the original vendor and against them also if he is a purchaser in good faith for value and without notice.
- [4] **ASSIGNMENT FOR BENEFIT OF CREDITORS—WHEN VALID.**—In the case at bar an assignment from an oil company to the plaintiff was a valid assignment for the benefit of the company's creditors, and divested the company of all title in and to the real and personal property thereby transferred.
- [5] **ID.—LACK OF IMMEDIATE DELIVERY AND CHANGE OF POSSESSION.**—An assignment for the benefit of creditors is not void under section 3440 of the Civil Code for lack of immediate delivery and change of possession, since that section is expressly made inapplicable to assignments for the benefit of creditors.

APPEAL from a judgment of the Superior Court of Fresno County. Geo. E. Church, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. E. Barbour for Appellants.

Edmund Tauszky and Johnston & Jones for Respondent.

WASTE, P. J.—The defendant, Thorwaldson, as sheriff of Fresno County, sold a quantity of oil-well casing, after third-party claim duly made on him by the plaintiff here, under execution issued out of the superior court of that county, on a judgment in favor of one J. W. Moore, plaintiff, and against J. M. Hendrickson et al., as trustees to settle the affairs of the Blair Oil Company, after charter forfeited, defendants. The plaintiff here brought this action against the sheriff, and the other defendant, the surety on his official bond, for damages for the conversion. Judgment went for the plaintiffs, and defendants appeal.

On February 12, 1912, the said Blair Oil Company being indebted to various creditors in an amount in excess of twenty thousand dollars, duly executed and delivered to Garn, the plaintiff here, an instrument in writing whereby it did "grant, sell, assign, transfer, convey and set over" unto him its real property in Fresno County, together with all the improvements, and personal property, "of whatever kind and nature" thereon, also all its leases, contracts, claims, and accounts connected therewith. This conveyance, or assignment, was made to Garn, in trust, to develop and operate said land; to manage, sell, and dispose of any and all of the property transferred to him; to collect the choses in action and settle and compromise all claims and demands, all "for the interest or benefit of the creditors of" the Oil Company. The instrument further provided that after payment by the trustee of the expenses of the trust, distribution, and payment "of the remainder of the proceeds and income to, and among all the creditors of the party of the first part ratably in proportion to their respective debts," any surplus remaining should be paid, and any property unsold or undisposed of should be retransferred, to the Oil Company.

The assignment was jointly and severally consented to in writing by each and all the creditors of the company. It was delivered to the trustee, but was never recorded. At the time it was so made and delivered the quantity of oil-well casing, which was subsequently attached and sold under the execution sale herein before referred to, was in a pile on the real property, and near oil well No. 2, thereon.

On March 1, 1913, the Blair Oil Company forfeited its charter by failing to pay its franchise tax.

When the present case came on for trial in the lower court, in addition to showing the foregoing facts, the plaintiff introduced considerable testimony tending to show that the transfer of the property, by the Oil Company to the trustee, was accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred. This evidence was offered, apparently, for the purpose of showing that the requirements of section 3440 of the Civil Code, relating to fraudulent transfer of personal property, had been complied with. The allegations of the complaint setting forth the due proceedings culminating in the execution sale were admitted by failure to deny, and the only issue presented by the pleadings was as to validity of the assignment to Garn, the trustee, and his claim of ownership of the personal property.

Defendants thereupon sought to show that on August 26, 1913, six months after the forfeiture of the charter of the Oil Company, and a year and a half after the making of the assignment by the company to Garn, J. W. Hendrickson, who at all times, up to the forfeiture of the charter by the corporation, had been its president and one of its directors, and at that time, therefore, one of its trustees, by operation of law, to settle up its affairs, had employed J. W. Moore, to go, and that he did go, upon the real property which was described in the assignment, and take possession and control of the personal property thereon, and watch and preserve the same for, and as the possession of, the Blair Oil Company; that, as the employee and servant of the Blair Oil Company, said Moore remained in possession and control of the personal property until he brought the suit against the trustees of the Blair Oil Company, in March, 1917, and recovered the judgment on which the execution issued which led to the sale complained of here.

Defendants also offered to show that Garn, trustee under the assignment, had never taken possession of the property or exercised over it any acts of ownership as required by section 3440 of the Civil Code; that Moore never had notice of the assignment to Garn, and never saw Garn, or anyone representing him, in connection with the property until four years after the assignment; that Garn then stated to him that he was not responsible for Moore's wages and did not know him in the transaction.

Defendants' object in offering the foregoing testimony was to offset the showing of plaintiff as to the delivery of the personal property, transferred by the assignment to the trustee, and for the further purpose of establishing, under the provision of the same section of the code, that Moore, plaintiff in the suit whence arose the execution sale, became a creditor of the Blair Oil Company (or its trustees settling its affairs) while it remained in full possession of the property.

Sustaining the objections of the plaintiff to the offered testimony, the trial court held that the "only question for the consideration of the court was as to whether the property was put out of the hands of the corporation by the assignment." Defendants rested without further showing, whereupon the court made its finding that plaintiff was owner of the casing and gave him judgment against defendants for its value at the time of the conversion.

Defendants claim that the court erred in its ruling and judgment, and on appeal base their contention on the grounds, first, that the assignment by the Blair Oil Company to Garn was not a valid assignment for the benefit of creditors, and, second, that if the assignment was valid at the time it was made, it was void as to Moore, who later became a creditor while the property still remained in the possession of the Oil Company, and its trustees. They base their argument on their construction of section 3440 of the Civil Code relating to fraudulent transfers, and section 3449 et seq. of the same code relating to assignments for the benefit of creditors.

Section 3440 of the Civil Code, as it stood at the time of making the assignment, so far as pertinent to this discussion, was as follows:

"Every transfer of personal property, . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer; provided, however, . . . that the pro-

visions of this section shall not apply or extend . . . to any transfer or assignment made for the benefit of creditors generally. . . . ”

Sections 3449 to 3473 of the Civil Code provide the procedure by which an insolvent debtor may in good faith execute, to the sheriff of the county in which he resides, an assignment of property in trust for the satisfaction of his creditors. One of these sections, 3458, provides that the assignment and the transfer by the sheriff must be in writing and properly subscribed, acknowledged, and recorded, in the mode prescribed by the chapter on recording transfers of real property. The next section, 3459, provides that unless the provisions of said section 3458 are complied with, an assignment for the benefit of creditors is void against every creditor not assenting thereto.

[1] It cannot be seriously contended that the instrument here complies with the foregoing sections, 3449 to 3473. On the appeal, respondent admits it does not measure up to the requirements of a statutory assignment. An assignment which falls short of the requirements of these sections, however, is valid as against the assignor and all creditors assenting to it, and serves to vest the assignor's title to the property in the assignee. It is, at most, void only against creditors not assenting thereto and against purchasers and encumbrancers in good faith and for value. (*Wilhoit v. Lyons*, 98 Cal. 409, [33 Pac. 325].)

[2] It is likewise the law that a sale of personal property, though not followed by immediate delivery, and actual and continued change of possession, as required by section 3440 of the Civil Code, is not a nullity, but is good against all the world except the creditors of the vendor, and is good against them also except when attacked in legal proceedings for the collection of their debts; and that the vendee, being the owner, can convey title thereto, [3] and the purchaser from him will, in any event, acquire a title good against all the world, except the creditors of the original vendor, and against them also if he is a purchaser in good faith, for value, and without notice. (*Paige v. O'Neal*, 12 Cal. 483; *Wilhoit v. Lyons*, *supra*; *Williams v. Borgwardt*, 119 Cal. 81, [51 Pac. 15].) Such assignments pass the title to the assignee and the assignment becomes irrevocable. (*Bryant v. Langford*, 80 Cal. 542, [22 Pac. 219].)

The supreme court of this state has said: "If the conveyance is to a trustee, and the debtor intends to divest himself not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, in legal effect it is an assignment for the benefit of creditors . . . The material and essential characteristic of a general assignment is the presence of a trust. . . . The provision that a surplus of proceeds remaining after satisfaction of the claims of the creditors named should be returned to the grantor does not distinguish the contract as one of security only. The reservation of an interest in the possible surplus—not in the property itself—marks the transaction more clearly as an assignment for the benefit of creditors." (*Sabichi v. Chase*, 108 Cal. 86, 87, [41 Pac. 30].)

[4] We are of the opinion that the assignment from the Blair Oil Company to Garn was a valid assignment for the benefit of the company's creditors, and divested the company of all title in and to the real and personal property thereby transferred.

Appellant's remaining contention is that even if the assignment was valid at the time it was made, it subsequently became void as to Moore, under section 3440 of the Civil Code (*supra*), by reason of the fact that he became a creditor of the corporation, or its trustees settling its affairs, after forfeiture of its charter, while they remained in possession of the personal property, described in the assignment; that had the defendants been allowed to introduce the proffered evidence, it would have established those facts; that such facts being shown, it would follow as a conclusion of law that the property was rightly seized by Moore in the hands of Garn, the trustee, as though there had been no attempted transfer by the Oil Company. If the assignment had been executed to effect merely an ordinary transfer of personal property, this contention of appellant would be sound. (*Watson v. Rodgers*, 53 Cal. 401; *Kohrbough v. Johnson*, 107 Cal. 149, [40 Pac. 37].)

[5] But, as already pointed out, the assignment in question was one for the benefit of creditors generally. By its own terms, section 3440 of the Civil Code does "not apply or extend to any transfer or assignment for the benefit of creditors generally."

The testimony sought to be introduced by defendants in the court below was therefore immaterial, and not in response to any issue within the pleadings in the case. The ruling of the court excluding the evidence was correct, and judgment followed accordingly.

Said judgment is therefore affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 2617. First Appellate District, Division One.—February 26, 1919.]

HOMER C. PARKER, Appellant, v. E. C. SWETT et al.,
Respondents.

- [1] **EASEMENTS—PARTITION OF LANDS HELD IN COMMON—SERVITUDES RESERVED.**—Where tenants in common of a tract of land partition it between them, the one taking the southern half reserving certain servitudes in the northern half conveyed to his former cotenant, the servitudes or easements reserved can be charged only against the property covered by the partition deed and not against adjoining property subsequently acquired by the servient owner, section 1106 of the Civil Code relating to subsequently acquired title passing by operation of law having no application to such case.
- [2] **ID.—RIGHT OF WAY FOR PIPE-LINE—ACTION TO QUIET TITLE.**—An action will lie to quiet title to a right of way for a pipe-line, although the line has not been constructed.
- [3] **ID.—REASONABLE ROUTE.**—Where the route for a pipe-line is not definitely described in the deed, a reasonable route is intended, and title may be quieted to such reasonable route.
- [4] **ID.—COURT TO DESIGNATE ROUTE.**—A court of general equitable jurisdiction will in such case designate for the parties what would be a reasonable route under all the circumstances in evidence.
- [5] **PLEADING—DEMURRER TO COMPLAINT OVERRULED—MOTION FOR NONSUIT.**—Where an objection to the form of an action goes to the question of whether or not the complaint states a cause of action, and this question has been decided by the trial court in overruling a demurrer to the complaint, the question is not proper for consideration on motion for a nonsuit.
- [6] **QUIETING TITLE—DISCLAIMER BY ONE DEFENDANT—NONSUIT AS TO ALL DEFENDANTS.**—In an action to quiet title to certain easements, the granting of a nonsuit in favor of all defendants was clearly erroneous as to one of the defendants who had expressly disclaimed any interest in the rights sought to be quieted.

- [7] **ID.—NONSUIT AS TO ALL EASEMENTS—ADMISSION THAT PLAINTIFF ENTITLED TO SOME.**—A judgment of nonsuit as to all easements claimed by plaintiff should be reversed when defendants concede that plaintiff is entitled to three of the easements claimed.
- [8] **STATUTE OF LIMITATIONS—RIGHT OF WAY FOR PIPE-LINE.**—In order for the statute of limitations to run against a cause of action to quiet title in plaintiff to a right of way for a pipe-line, there must be positive and definite evidence of an adverse claim and an adverse holding.
- [9] **ADVERSE POSSESSION—NEGATED BY RECOGNITION OF RIGHTS.**—Express recognition, by reservations in deeds, of plaintiff's rights as the owner of the dominant estate by successive owners of the servient estate, is contrary to any claim of adverse possession.
- [10] **EASEMENT—GRANT—NONUSER.**—An easement founded on a grant cannot be lost by nonuser, no matter how long the nonuser may continue.
- [11] **ID.—ABANDONMENT.**—Such an easement may be lost by abandonment only when the intention to abandon clearly appears.

APPEAL from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge. Reversed.

The facts are stated in the opinion of the court.

Samuel C. Wiel, William E. Colby, Percy S. King and Clarence N. Riggins for Appellant.

R. P. Henshall for Respondent E. C. Swett.

KIERRIGAN, J.—This is an appeal from a judgment for defendants following an order of nonsuit. The action was to quiet title in the plaintiff to certain easements upon the lands of defendants alleged to be appurtenant to the land of plaintiff. Appellant contends that the nonsuit was improperly granted.

The facts of the case are briefly these: In 1890, W. W. Thompson and Horace B. Chase were the owners in common of certain lands in Napa County. On May 7th of that year, this land was partitioned between them. Thompson received by the partition deed the southern half of the original tract and Chase received the northern half. By mesne conveyances the southern half became the property of the present plaintiff and the northern half became the property of the defendant Swett. By the partition deed, above referred to, Thompson,

the predecessor in title of plaintiff, reserved to himself five servitudes or easements over and upon the northern half of the land, which land is at this time the property of the defendant Swett. These easements are expressed as follows in the partition deed:

"And the said party of the first part hereby excepts and reserves from the operation of this conveyance unto himself his heirs and assigns forever, and as appurtenant to the tract of land adjoining the above described premises on the south, which has this day been granted by the party of the second part to the party of the first part, and to which conveyance or grant reference is hereby had and made for a description of the lands so adjoining on the south, the following rights, privileges and easements, to wit:

"First. A right of way over, in, along and through all roads upon the above described premises.

"Second. A right of way over, in, along and through all avenues in the vineyard upon said lands so long as said avenues shall continue to exist either in vineyard or orchard.

"Third. A right to take, use, appropriate, divert, lead and carry away, in pipes or otherwise, one-half of the waters flowing or that may flow, in the stream on said premises, to be taken at or near the point where the waters of said stream are now partially diverted in pipes leading to the dwelling on said premises.

"Fourth. The right of way for a line of pipe for water from the point where said waters may be diverted over, across, in and through said premises to the said adjoining tract on the south, such pipe to be laid so as not to interfere with the proper cultivation of said premises, and also, the right at all times to enter in and upon said premises for the purpose of viewing, changing, repairing or reserving said pipe that may be so laid, and making and maintaining a proper division of such water.

"Fifth. The right to enter in and upon said premises and mine and quarry from the rock quarry on said premises, such rock as he may see fit, with the right to remove the same."

The defendant Carlston answered, claiming an interest in the northern half as a mortgagee only—and his rights, of course, would be determined by those of the defendant Swett, his mortgagor. The defendant Clarence Grange disclaimed all interest in the land.

[1] At the outset we will consider the right of plaintiff to charge these easements and servitudes so reserved against the northern half of the original tract, against an adjoining parcel of land also described in the complaint, which was acquired by Chase some time after the partition deeds were made, and which passed with the other land to the defendant Swett. We think this cannot be done. The partition deeds, in terms, referred only to the land originally held in the one tract. This was all the land that was in contemplation of either party. Appellant states that the third tract, afterward acquired by Chase, contained some of the headwaters of the stream of water which flows upon the land partitioned, and argues that a half interest in the entire stream was granted by the partition deed, and therefore the predecessor of the defendants having later acquired title to a portion of the thing which he had previously granted to Thompson, that later acquired title would redound to the benefit of his grantee Thompson and his successors in interest under the provisions of section 1106 of the Civil Code. We think this section does not apply to the present case. It is very clear from the entire instrument, and from the situation of the parties themselves, that there was no intention to convey anything but a right to the use of the water which was upon the northern half of the original tract of land. Indeed, the deed itself, after describing the premises constituting the northern half of the original tract, grants the "right to take, use, appropriate, divert, lead and carry away, in pipes or otherwise, one-half of the waters flowing or that may flow in the stream *on said premises*, to be taken," etc.

Therefore, as to the portion of the land owned by the defendant Swett which was acquired by her predecessor in interest after the partition of the original tract between Thompson and Chase, we think the nonsuit was properly granted.

[2] As to the portion of the land owned by defendant Swett, which was acquired by her through mesne conveyances from Chase which originally was a part of the tract partitioned between Thompson and Chase, we are of a different opinion. The point is raised in the statement of the trial court in granting the nonsuit, and in the arguments of counsel, that an action to quiet title is not the proper form of action for the plaintiff to pursue, particular stress being laid upon the argument that title cannot be quieted to a pipe-line not in existence. The easement in regard to a pipe-line was

of a "right of way for a pipe-line." It has been repeatedly held that the right to an easement of this kind may be quieted. (*Stone v. Imperial Water Co.*, 173 Cal. 39, [159 Pac. 164]; *Arroyo etc. Co. v. Dorman*, 137 Cal. 611, 612, [70 Pac. 737]; *Los Angeles v. Los Angeles Co.*, 152 Cal. 647, [93 Pac. 869, 1135]; *Verdugo v. Verdugo*, 152 Cal. 655, [93 Pac. 1021]; *Los Angeles v. Hunter*, 156 Cal. 604, [105 Pac. 755]; *Watson v. Lawson*, 166 Cal. 236, [135 Pac. 961]; *Byington v. Sacramento Valley etc. Co.*, 170 Cal. 132, [148 Pac. 791].)

[3] It is true that the route of the pipe-line is not definitely described in the deed, but it has been held that in such a case a reasonable route is intended, and title may be quieted to such reasonable route. (*Ballard v. Titus*, 157 Cal. 683, [110 Pac. 118]; Civ. Code, sec. 1419; *Sulloway v. Sulloway*, 160 Cal. 513, [117 Pac. 522]; *Stone v. Imperial Water Co.*, 173 Cal. 39, [159 Pac. 164]; *Byington v. Sacramento Valley etc. Co.*, 170 Cal. 132, [148 Pac. 791].)

[4] It is proper and customary under such circumstances, in view of the general equitable jurisdiction to do full and complete justice in one action, for the court to designate for the parties just what would be a reasonable route under all the circumstances in evidence. (*Ballard v. Titus*, 157 Cal. 683, [110 Pac. 118]; *Davidson v. Ellis*, 9 Cal. App. 145, [98 Pac. 254]; *Gazos etc. Co. v. Coburn*, 8 Cal. App. 158, [96 Pac. 359].)

[5] However, the objection of respondent as to the form of the action would go to the question of whether or not the complaint stated a cause of action, and this question had been decided by the trial court in overruling defendant's demurrer to the complaint. It was not a proper consideration upon the motion for nonsuit. (*Keefe v. Keefe*, 19 Cal. App. 315, [125 Pac. 929].) But the question has been raised and argued by both counsel, and it is stated by the trial court as a reason for granting the nonsuit. It will probably become material at the next trial of the action, and we have therefore discussed it here.

[6] The court granted the nonsuit in favor of all the defendants. Defendant Grange had expressly disclaimed any interest in the rights sought to be quieted. Clearly as to this defendant, the nonsuit was error.

[7] Again, the trial court granted a nonsuit as to all the easements sought to be quieted. It is admitted in the brief of

respondent, and upon the hearing in this court, that at the trial the right of the plaintiff to three of the easements was expressly conceded by the defendants. In respondent's brief we have the following statement:

"The record below on the motion for a nonsuit shows that counsel for the defendant expressly stated—'the roadways, which by the way, your Honor, are not in dispute between us, as to the roads, there is no doubt as to the right of Parker to these roads.' And appellant's counsel will probably concede that these roads are being used by plaintiff to this day. And not alone was this concession made at the trial, but the roads and avenues referred to are in use by the plaintiff up to this very moment. He is not therefore in any wise aggrieved in respect of them.

"Nor is the right of the plaintiff to enter upon the premises and mine and quarry rock, under the fifth easement, in dispute. The record shows that counsel for the defendant said, 'one of them was the right to go in on the premises and quarry rock, which is not in dispute to this day and which has been exercised by Mr. Parker and his predecessors.'"

However, the answer of defendant Swett denied that the plaintiff is the owner of all or any of the five easements, and this became a matter in issue. The judgment of nonsuit against the plaintiff in his suit to quiet his title to these rights is a cloud upon his title—and the fact that he may be using them at the present moment without objection from the defendants does not remedy the injustice. We fail to comprehend the logic of the respondent's position in asserting that the plaintiff is entitled to these rights and yet seeking to uphold a judgment which denied them to him. As to these three easements, unquestionably, the judgment of nonsuit should be reversed.

[8] The respondent argues in support of the judgment regarding the easement for a right of way for a pipe-line, first, that the statute of limitations has run against plaintiff's right. It has been repeatedly held that in order for the statute to run in a case like this, there must be definite and positive evidence of an adverse claim and an adverse holding. (*Half Moon Bay Land Co. v. Cowell*, 173 Cal. 543, [160 Pac. 675]; *Barlow v. Frink*, 171 Cal. 165, 170, [152 Pac. 290].)

[9] There is distinctly no evidence in the record of any denial of plaintiff's right until the time when the present de-

fendant acquired the land, which was in August, 1913—less than three years before the commencement of this action. On the contrary, the deeds in evidence by which the successive grantees in the chain of defendant Swett's title acquired the land, and the deed to defendant Swett herself made in 1913, show in each case an express recognition of the right of plaintiff, for each deed contains the reservations in favor of the southern portion of the original tract, in the identical language of the first deed to Chase. This express recognition of plaintiff's rights as the owner of the dominant estate, by each successive owner of the servient estate, is contrary to any claim of adverse possession. [10] It is true that the plaintiff and his predecessors have neglected for twenty-five years to exercise their right to lay a pipe-line, but an easement founded upon a grant cannot be lost by mere nonuser, no matter how long that nonuser may continue. (*Currier v. Hewes*, 103 Cal. 437, [37 Pac. 521]; *Walker v. Lillingston*, 137 Cal. 401, [70 Pac. 282].) [11] And such an easement may only be lost by abandonment when the intention to abandon clearly appears. (*Moore v. Sherman*, 52 Mont. 542, [159 Pac. 967].) In this case there was no intention to abandon, and no evidence appears that would indicate such an intention. On the contrary, the evidence of the plaintiff is decidedly to the effect that he never intended to abandon the right. The evidence of plaintiff's predecessor in interest is to the effect that he never exercised his right to lay the pipe for the reason that he did not require the water during his ownership of the ranch and the installation of a pipe-line was quite expensive. "Mere failure to take and use the water for which he has at the time no need will not forfeit the right to the vendor in such a case." (*Copeland v. Fairview Land etc. Co.*, 165 Cal. 166, [131 Pac. 119].)

From our conclusions, it appears that the nonsuit should not have been granted except as to that portion of the land owned by the defendant Swett which was not included in the original partition between Thompson and Chase. The order appealed from is therefore reversed, with instructions to the trial court to proceed in accordance with the views herein expressed.

Waste, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on March 28, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919.

All the Justices concurred, except Wilbur, J., who did not vote.

[Civ. No. 2875. Second Appellate District, Division Two.—February 26, 1919.]

G. H. BUBLITZ, Respondent, v. W. H. REEVES et al.,
Defendants; W. H. REEVES, Appellant.

- [1] **APPEAL—ALTERNATIVE METHOD—QUIETING TITLE—DENIAL OF NON-SUIT—EXAMINATION OF IMPERFECT RECORD.**—In an action to quiet title, on an appeal by the alternative method, where the denial of a nonsuit is claimed by appellant to have been erroneous and the appellant prints as an appendix to his brief practically the entire record of title, consisting of many conveyances and other documents, without calling attention to any alleged error or omission as affecting the vesting or divesting of ownership of the property involved in the action, the appellate court will not make a search of this complicated record, without the aid of counsel, to either prove or disprove the uncontroverted statement in respondent's brief that at the time he rested on the first hearing the evidence established his title to a two-thirds interest in the property in question.
- [2] **ACTION TO QUIET TITLE—NONSUIT—PROPERLY DENIED WHERE SUBSTANTIAL INTEREST SHOWN.**—In an action to quiet title, where plaintiff shows title to a two-thirds interest, a nonsuit is properly denied.
- [3] **ID.—DENIAL OF NONSUIT—EVIDENCE SUPPLIED ON FURTHER HEARING.**—If after the denial of a nonsuit evidence is introduced on further hearing, and upon the conclusion of the whole case there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying the nonsuit becomes of no consequence.
- [4] **TRIAL—REOPENING HEARING OF EVIDENCE—DISCRETION OF TRIAL COURT.**—It is within the discretion of the trial court to reopen the hearing of evidence at any time before the trial is concluded and until the decision of the court by its written findings, made and filed.

- [5] **QUIETING TITLE—TAX DEED SET OUT IN ANSWER—FAILURE TO DENY BY AFFIDAVIT—ADMISSION OF GENUINENESS.**—The genuineness and due execution of a tax deed set up in defendant's answer in an action to quiet title is admitted under section 448 of the Code of Civil Procedure by failure of the plaintiff to file an affidavit denying the same.
- [6] **ID.—ESTOPPEL FROM DENYING VALIDITY.**—But such admission of the genuineness and due execution of the tax deed does not estop the plaintiff from denying its validity in any other respect.
- [7] **ID.—TAX TITLE—EVIDENCE—DEED TO STATE.**—In an action to quiet title where defendant claims title under a tax deed, it is essential for him to produce in evidence a deed to the state as well as a deed from the state; a recital in the deed from the state that the property was sold and conveyed to the state for nonpayment of taxes is insufficient.

APPEAL from a judgment of the Superior Court of Los Angeles County. C. A. Raker, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

J. Irving McKenna and Catherine A. McKenna for Appellant.

Carter, Kirby & Henderson for Respondent.

SLOANE, J.—This was an action by plaintiff to quiet title to a parcel of land in the city of Pasadena, county of Los Angeles. The defendant Reeves was the only defendant answering the complaint. By his answer he denied plaintiff's title, and claimed title in himself under a state tax deed from the tax collector of Los Angeles County, set out in full in a pleading filed as a cross-complaint.

On the trial plaintiff introduced record evidence purporting to show chain of title from United States patent, through mesne conveyances, to himself, and rested. The defendant Reeves moved for nonsuit on the ground that the evidence was insufficient to show title in the plaintiff. The motion was denied, and no further evidence being offered, the court directed judgment for the plaintiff. Thereafter, and before the decision and findings were made and filed, the plaintiff filed his notice of motion, with affidavit supporting the same, that the hearing be reopened for the introduction of further evidence in support of plaintiff's title, on the ground of in-

advertence, mistake, and oversight on the part of plaintiff in failing to introduce at the hearing certain conveyances and other evidence material to plaintiff's case. On the presentation of this motion as noticed, the hearing was reopened, over the objection of defendant, and plaintiff was permitted to introduce, and thereafter and on a day set therefor did introduce, further evidence in his chain of title. Plaintiff also offered record evidence in rebuttal of defendant's tax deed purporting to show that the tax levy on which the sale to the state, under which the tax collector's deed as set out in defendant's cross-complaint was issued was void. The only evidence offered by the defendant Reeves was his state tax deed executed by the county tax collector and testimony of himself as to consideration for the deed, and that he had been in possession of the property since the execution of the deed under which he claims title. At the conclusion of this additional evidence defendant again moved for a nonsuit, which was by the court denied. Findings were thereafter made in favor of the claim of title of plaintiff, and against the claim of title of defendant, and judgment was made and entered quieting title in the plaintiff. Appeal was taken from the judgment by the defendant Reeves, under the alternative method.

The record in this case is a voluminous one, covering about two hundred typewritten pages, and including all the conveyances, maps, and records constituting plaintiff's chain of title, upward of thirty documents in all; but as no specification of their insufficiency is contained in appellant's brief, although all the deeds are printed in the appendix thereto, we assume that there is no dispute as to the sufficiency of the record to show title in plaintiff, subject only to defendant's tax deed. The only specifications of error, in fact, presented and argued by the appellant, are on the ruling of the court denying his motion for nonsuit against the plaintiff, the order reopening the trial for the introduction of further evidence after directing judgment for the plaintiff, and failure to require, as a condition of quieting plaintiff's title, a repayment of the money advanced on the tax title.

[1] Whether the state of the evidence at the conclusion of the original hearing entitled defendant to a nonsuit we shall not attempt to determine. Under section 953c of the Code of Civil Procedure, parties appealing on the typewritten record are required to print in their brief, or in an appendix thereto,

such portions of the record as they desire to call to the attention of the court. The appellant in this case has printed as an appendix to his brief practically the entire record of title, consisting of upward of thirty conveyances, and other documents constituting plaintiff's chain of title, without calling attention to any alleged error or omission as affecting the vesting or divesting of ownership of this property. Respondent in his brief claims that at the time he rested on the first hearing the evidence established his title to a two-thirds interest in the property in question. There is no reply brief of appellant on file, so this claim is not controverted; and we do not feel like making a search of this complicated record, without aid of counsel, to either prove or disprove the statement. [2] If it is correct, the defendant was not entitled to a nonsuit. (*Davis v. Crump*, 162 Cal. 513, [123 Pac. 294].) [3] However, we deem this point immaterial, if the court was justified in reopening the case for further evidence, as on the further hearing evidence was introduced completing plaintiff's chain of title and supporting the judgment in his favor. "If upon the conclusion of the whole case there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying nonsuit becomes of no consequence." (*Peters v. Southern Pac. Co.*, 160 Cal. 48, [116 Pac. 400]; *Lowe v. San Francisco etc. Ry. Co.*, 154 Cal. 573, [98 Pac. 678].)

[4] The court was justified in reopening the case for further evidence. It was within the discretion of the court to reopen the hearing of evidence at any time before the trial was finally concluded, and until the decision of the court, by its written findings, was made and filed, the trial was not ended. (*Warring v. Freear*, 64 Cal. 54, [28 Pac. 115]; *Connolly v. Ashworth*, 98 Cal. 205, [33 Pac. 60]; *San Francisco Breweries v. Schurtz*, 104 Cal. 420, [38 Pac. 92].)

The judgment for the plaintiff, then, must be sustained unless his title is defeated by the tax deed to defendant. [5] The only evidence in support of this adverse claim is the deed from the tax collector of Los Angeles County, purporting to convey to defendant a tax title from the state of California. This deed was set out in defendant's answer and cross-complaint, and no affidavit denying the same was filed, as provided by section 448 of the Code of Civil Procedure. Its

genuineness and due execution were, therefore, admitted, and it must be taken for what, on its face, it appears to be.

[6] But this does not estop the plaintiff from disputing its validity in any other respect. (*Moore v. Copp*, 119 Cal. 429, [51 Pac. 630].) It does not imply an admission of title in the state of California, or its authority to convey. The only intimation that the state had any title to convey is contained in a recital in the deed "that the real property hereinafter described was duly sold and conveyed to the state of California for the nonpayment of taxes which had been legally levied, and which are a lien upon said property under and in accordance with law." As was declared in *County Bank v. Jack*, 148 Cal. 437, [83 Pac. 705], such recital "cannot be allowed to have the effect of operating as proof of the execution of a previous deed whereby the title of the taxpayer has been transferred to the state"; and it is further there held that the tax collector's deed alone was not sufficient to show that the state had acquired the title of the original owner. [7] The production in evidence of a deed to the state vesting title of the delinquent taxpayer in the state, together with the introduction of a deed from the state to the purchaser, was essential in order to establish that the purchaser had acquired the title of the delinquent taxpayer to the land; and the production of the deed from the state to the purchaser was not alone sufficient. (*Jones v. Luckel*, 174 Cal. 532, [163 Pac. 906].)

Respondent in his brief, in further opposition to the claim of appellant under the tax deed, attacks the validity of the proceedings for the tax assessment, levy, and sale upon which the deed in question purports to be based; but in view of the insufficiency of appellant's showing of title in himself, already pointed out, it is unnecessary to consider this point.

There is nothing in the pleadings presenting any issue for the recovery by defendant of any payments made in connection with his purported tax title, and nothing to show the amount or value of the payments, other than a recital in the copy of the deed attached to the answer that the consideration for the deed was defendant's bid of \$301 for the property. Some evidence seems to have been taken on the trial on this point, over plaintiff's objections, and appellant in his brief claims that he paid \$86.46 delinquent taxes, and also \$40 on the taxes under the tax sale, but no reference to the evidence on this point is contained therein, either in the brief

itself or the appendix thereto. The showing made is too indefinite and obscure to justify the court in determining the equities that appellant might have in this particular.

Parties relying upon the often cumbersome and intricate record of the reporter's transcript must conform to the provisions of section 953c of the Code of Civil Procedure if they want to insure a satisfactory consideration of the evidence.

The judgment appealed from is affirmed.

Finlayson, P. J., and Thomas J., concurred.

[Civ. No. 2867. Second Appellate District, Division Two.—February 26, 1919.]

CONSOLIDATED LUMBER COMPANY (a Corporation),
Respondent, v. BOSWORTH, INC. (a Corporation),
Appellant; P. C. DOWELL, Defendant.

- [1] MECHANIC'S LIEN—TIME FOR FILING CLAIM—WHEN BEGINS TO RUN—NOTICE OF COMPLETION.—The time for filing a claim of mechanic's lien begins to run not from the date of completion, but from the date of the owner's filing of notice of completion of the contract, and it is in time if filed within thirty days thereafter.
- [2] ID.—FINDING SUFFICIENTLY DEFINITE—"ON OR ABOUT."—A finding that notice was filed "on or about" a stated time, if indefinite, is not reversible error under section 4½ of article VI of the constitution where there was, in fact, a leeway of several days in which notice might have been filed, and the evidence showed that notice was filed in time.
- [3] ID.—FINDINGS—CONTRACT FOR LUMBER—PRICE IN ACCORDANCE WITH CLAIM OF LIEN.—Evidence examined and found to sustain the finding of the court that the contract for lumber was for the reasonable market value and not a fixed price.
- [4] ID.—CONCRETE "FORMS"—MATERIAL USED FOR—RIGHT TO LIEN.—Where the nature of concrete work contracted for is such as to require the use of forms to hold it in place while it hardens into a self-sustaining permanent structure, and the materials from which the forms are made are consumed in the process, such materials come within the definition of "materials to be used or consumed" in the construction of a building as contained in section 1183 of the Code of Civil Procedure.

- [5] **ID.—MEASURE OF LIABILITY FOR MATERIALS USED IN FORMS—DEPRECIATION IN VALUE OF LUMBER CONSUMED.**—The percentage of the depreciation in value of lumber consumed by using it for the making of concrete forms, if justified by evidence, is a proper mode of determining the amount for which a lien may be had for materials so used.
- [6] **ID.—FORECLOSURE—PROOF—CIRCUMSTANTIAL EVIDENCE.**—In an action for the foreclosure of a lien for materials used in the construction of buildings, if there is sufficient evidence as to the circumstances and negotiations of the contract and delivery of the material to give rise to a legal inference that the parties arrived at an understanding that the material was sold to be used in the erection and construction of the buildings in question, then under sections 1832, 1859, and 1960 of the Code of Civil Procedure, the court can so find, and base its finding thereon without a word of direct testimony as to such agreement or understanding.
- [7] **ID.—SEVERAL CONTRACTS FOR BUILDINGS ON SAME PROPERTY—VARIANCE.**—Where in a foreclosure under the mechanic's lien law of 1911 the liability of the owner is not limited owing to the failure to file a bond, and the evidence shows three contracts for buildings or parts of buildings on the same property as part of a single enterprise, it can make no difference to the owner whether the liens chargeable against the property arise under one or other of the contracts, and an allegation in the complaint of one contract is not at fatal variance with the proof.
- [8] **ID.—CARTAGE.**—Claims for cartage of materials are properly included in a lien claim as part of the price of materials furnished.
- [9] **APPEAL—FAILURE TO FIND ON ESSENTIAL ISSUE—CONCRETE FORMS—NECESSITY FOR RETRIAL.**—In this suit for the foreclosure of a mechanic's lien, where the court found that all but ten per cent of the value of the lumber used in concrete forms was consumed in such use, but did not determine the amount or value of the material so used, and neither the value nor the quantity is shown in evidence, the cause must be remanded for trial on that issue.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Reversed.

The facts are stated in the opinion of the court.

H. C. Beach, W. N. Goodwin and Hunsaker & Britt for Appellant.

Frank D. McClure for Respondent.

SLOANE, J.—This is an appeal of the defendant Bosworth, Inc., from a judgment foreclosing upon said defendant's real property a mechanic's lien for materials alleged to have been furnished to and used by the contractor in the construction of buildings on said premises. Appellant asks that the judgment be reversed on the following grounds:

1. That the claim of lien was not filed in time.
2. That there is a fatal variance between the lien claim and the proof as to the terms of the contract of sale.
3. That the lumber used for forms for pouring cement for the buildings is not the basis of a valid lien.
4. That the proof fails to show that the materials furnished were expressly contracted for the buildings in question.
5. That the finding as to the date of filing claim of lien is indefinite and insufficient.
6. That the complaint alleges, and the court finds, that the buildings in question were erected by virtue of *an* agreement, whereas the proof shows that the buildings were erected under *three separate* agreements.
7. That items of charges sought to be recovered are not covered by the claim of lien.

1. We will consider the first and fifth alleged grounds of error together, as both are directed to the time of filing claim of lien. The court finds that notice of completion of these buildings was filed "*on or about*" the twenty-seventh day of August, 1914, and that thereafter, and "*on or about*" the twenty-first day of September, 1914, the claim of lien was filed. It is alleged in the complaint, and not denied in the answer, that the claim of lien was recorded, "*on*" September 21, 1914. The proof showed that the notice of completion was filed "*on*" the twenty-seventh day of August, and the claim of lien "*on*" the twenty-first day of September. It also appeared in evidence that the buildings were actually completed and accepted on the twenty-first day of August. [1] Appellant argues that the time for filing claim of lien began to run from the date of completion, and that more than thirty days elapsed before the filing of the lien claim, if it was filed September 21st; and that, in any event, the finding is too indefinite in fixing the time "*on or about*" the dates mentioned. Whatever merit this contention might have if under the facts the last day for filing the claim had been on the 20th or 21st

of September, it is without force under the recent decisions that a lien claimant for materials furnished a contractor may make his filing within thirty days after the date of filing notice by the owner of completion of the contract. (*Hughes Mfg. & L. Co. v. Hathaway*, 174 Cal. 44, [161 Pac. 1159]; *Pioneer Paper Co. v. Hathaway*, 39 Cal. App. 405, [179 Pac. 227].) [2] In this case the claimant had several days remaining after September 21st, in which he might file his claim of lien, and with this margin of time a finding that the notice of completion was filed "on or about" the 27th of August, and the notice of lien "on or about" the 21st of September, is probably sufficiently definite as a finding that the lien claim was made within a period of thirty days; particularly as there is no question under the evidence as to that fact. If we were to concede that, as to this question, appellant's position were well taken, nevertheless, since we could not say upon this record that it was made to appear that justice had miscarried, it would be a proper case for the application of section 4½ of article VI of the constitution.

2. There is more room for dispute on appellant's second proposition. The complaint alleges, and it is set forth in the claim of lien, as follows: "That all of said materials were sold and delivered from time to time upon open account, commencing on the twenty-eighth day of April, 1914, and ending on the twenty-ninth day of July, 1914; that there was no express agreement as to the price to be paid for said materials, nor was there any time expressly agreed upon for the payment thereof; but that said materials, at the time of the sale and delivery thereof, were of the reasonable market value of fourteen hundred fifty-eight dollars (\$1458), upon which said sum has been paid two hundred fifty dollars (\$250), and no more."

[3] It is appellant's contention that the proof shows a specific agreement between Dowell, the contractor, and respondent as to the price for which this lumber was sold and delivered—namely, a fixed and agreed rate per thousand feet. If the record shows, as contended, that a specific sum of money, distinguishable from and independent of the market price, was agreed upon between the parties as the consideration of this sale, there can be no question, under the repeated rulings of the supreme court, that such fact would establish a fatal variance between the lien claim and the proof. (*Reed v. Norton*, 90 Cal. 590, [26 Pac. 767, 27 Pac. 426]; *Wagner v. Hansen*,

103 Cal. 104, [37 Pac. 195]; *Wilson v. Nugent*, 125 Cal. 280, [57 Pac. 1008]; *Robinett v. Brown*, 167 Cal. 735, [141 Pac. 368]; *Buell & Co. v. Brown*, 131 Cal. 158, [63 Pac. 167].)

In the case last cited the contract was the same as here claimed by appellant. The court there says: "The court found that the claim of lien set forth a contract to deliver the material at the reasonable market rate, but that the contract was an express one, to wit, \$26.50 per thousand for lumber, and \$2.50 per thousand for shingles. This was a fatal variance, and prevents a recovery by plaintiff." The substance of the evidence given on this point in the case at bar is as follows: "They were to furnish lumber for certain prices per thousand, and they furnished that lumber. I would say that the price that was paid for the lumber was the market price at that time. There was an agreement to a certain amount. It was practically the market price at that time. It was a certain amount per thousand; it was not a lump sum. There was an amount fixed and agreed upon for each class of lumber per thousand feet, on the first order. We had our understanding as to the price per thousand feet when we first went there. Q. And they agreed that they would furnish you certain lumber at so much a thousand feet? A. For that list of lumber that I submitted to them for prices. After that I simply sent in orders for additional lumber, and they furnished it. Q. And at the same prices which you had previously agreed upon? A. I couldn't say they charged the same prices in each case. I think they did. I do not remember that they deviated from the prices they had agreed upon. My understanding at the start was that the plaintiff would sell the lumber at so much per thousand feet for certain classes of lumber; and afterwards I sent in orders for more lumber, and it was furnished, and they charged on their bills the same prices originally agreed upon. The prices would run from \$14 to \$20, or some intermediate sum fixed on the first order which I submitted to them for a price. Q. I understand you to say that there was an agreement as to the price of the lumber. Did you have a contract? A. I had no contract; the agreement was the market price. It was listed off to me at the market price. I went to the representative of the Lumber Company, and I asked him for the prices on this material. He said it would be the market prices, and he gave me a list of the market prices."

The evidence further shows that on the occasion of entering into the agreement for this lumber only a small quantity of the lumber ultimately required was ordered. The deliveries covered a period of three or four months, and are evidenced by orders consisting of thirty-seven separate sheets. The aggregate amount of lumber purchased under these orders was 78,898 feet, and the price as charged to the contractor was a total of \$1,458. The evidence, we think, fairly shows that the prices charged by the Lumber Company were the fair market price, as well as the amount that would be arrived at from the prices per thousand feet as shown by the price list referred to by the parties when the first order was made. The construction of the agreement then entered into depends upon whether the price list referred to was used and accepted by the parties as determining the price of all the lumber to be ordered on this contract, or merely as fixing the market price on the order for that date, to be subject to any fluctuation in the market that might occur during the period covered by the subsequent orders.

There can be no question under the evidence that the contractor was offered what lumber he wanted at the market price, and was then shown a list purporting to contain the market price at that date. Had he ordered all his lumber at that time, it could conclusively be said that the list bound the parties to a fixed and definite price per thousand for the various sorts of lumber. But the contractor did not order his full bill of lumber; he only ordered a thousand or two feet. Nothing appears in the record to show that he was in any way obligated to buy another foot of material from this company. Was the company, then, under any agreement to continue this list price in the event there should be an advance in the market price of lumber, or could it say: "We will still furnish you lumber at the market price, but here is a new list showing the advanced price in the market?" If it had such right, then the rates per thousand were not fixed, and the mere fact that there was no change in the market during the period covered by the purchases would not alter the relations of the parties, or make the contract one for a fixed and unalterable price. Under an interpretation of the evidence as last indicated the facts would distinguish this case from the supreme court citations above given.

There has been a growing tendency in the decisions to as much liberality in the construction of the more technical requirements of the mechanic's lien law as is consistent with just regard for the rights of property owners. (*Corbett v. Chambers*, 109 Cal. 178, [41 Pac. 873]; *McGinty v. Morgan*, 122 Cal. 103, [54 Pac. 392].) And it has been repeatedly held that where the price named and the reasonable market price are the same, a variance between the lien claim and the proof in this particular is not fatal. (*Acme Lumber Co. v. Wessling*, 19 Cal. App. 406, [126 Pac. 167]; *Lucas v. Gobbi*, 10 Cal. App. 648, [103 Pac. 167]; *Star Mill & Lumber Co. v. Porter*, 4 Cal. App. 470, [88 Pac. 497]; *Blanck v. Commonwealth Amusement Corp.*, 19 Cal. App. 720, [127 Pac. 805].) The following language from the opinion in *California-Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 709, [118 Pac. 103, 110], is very applicable to the suggested construction of the evidence as to the terms in this case: "The appellant contends that the evidence does not sustain the findings of the court. Considered as a whole, the evidence received in support of this claim in our opinion does sustain the finding of the court. One of the witnesses testified that the price of \$9 per ton was quoted at the time some of the plastering material was ordered, and that this price was accepted; but it also reasonably appears from the evidence that it was contemplated by the parties that this material should be ordered from time to time as needed, and that the price to be paid therefor was not necessarily a uniform price of \$9 per ton, but such price as might be indicated by the state of the market at the particular time the merchandise was ordered."

Here, as in the case cited, the trial court found in accordance with the declarations of the claim of lien, and we think the finding was warranted by the evidence.

[4] 3. The next point presented is as to the application of the lien law to lumber furnished to the contractor by respondent and used in making forms for concrete work in the buildings.

This matter was argued on the apparent assumption that no case in point has been decided in the appellate courts of California. This was true at the time of filing the briefs, but the question has since been definitely passed upon in a well-considered opinion by Mr. Presiding Justice Chipman of the third appellate district, in the case of *Olson-Mahoney L. Co. v.*

Dunne Inv. Co., 30 Cal. App. 332, 344, [159 Pac. 178]. A rehearing was asked in the supreme court and denied on June 30, 1916. This decision, therefore, so far as applicable under the facts, will be taken as controlling the issue here. It was there held that in a concrete building, the construction of which required the use of lumber forms for sustaining the concrete in place until it hardened, and where the contract showed the indispensability and intimate connection of the forms with the erection of the building, and the lumber so used was of no value thereafter and was not used for another job, but some of it given away and some advertised for sale as firewood—the material so furnished and used was, within the contemplation of section 1183 of the Code of Civil Procedure, used in the construction of the building, and subject to claim of lien. In the present case it appears that the contracts called for concrete structural work in the buildings to be erected; and, although the specifications are not given, and it is not shown what was required in the way of forms for the cement, in any event, the evidence discloses that the forms were required; and the use of concrete for building purposes and the methods employed in such use are now so generally and systematically followed as to be a matter of common knowledge. It is apparent that under the prevailing methods of constructing reinforced concrete buildings, material for the forms is almost as much a necessity as the cement itself. Under these conditions we are in entire accord with the conclusion reached by Justice Chipman in the opinion cited. It is true that this opinion expressly disclaims the statement of any rule of general application, but the general rule that may logically be deduced from the conclusions reached is, that where the nature of the concrete work contracted for is such as to require the use of forms to hold it in place while it hardens into a self-sustaining and permanent structure, and the materials from which the forms are made are consumed in the process, such material comes within the definition of “materials to be used or consumed” in the construction of a building, as contained in section 1183 of the Code of Civil Procedure.

The language of this section of our code provision, so far as pertinent to the point at issue here, is: “Materialmen . . . furnishing materials to be used or consumed in . . . the construction . . . of any building . . . shall have a lien upon the property upon which they have . . . furnished materials . . .

for the value of such . . . material furnished." The words "or consumed" were inserted by the amendment of 1911, and what, if any, added significance they have given to the mechanic's lien law, so far as we are aware, has not been judicially determined. It is argued by appellant in this case that the word "consumed" is merely used as a synonym of the word "used," which precedes it. It hardly seems reasonable or in accordance with the rule which would give meaning to every part of a statute, to hold that the legislature had gone to the trouble of making this addition to the language of the code merely to repeat in another form the meaning already expressed in the word "used"; and, in the light of the limitation which had previously been suggested by the courts upon the expression "used in," as applying only to material which had actually entered into and become a part of the finished structure, it may be reasonably concluded that it was the legislative purpose to apply the term "consumed" to such a use of material in the construction of a building as would result in its destruction. We had, previous to this amendment, the ruling, inconsistent with the prevailing doctrine, that powder furnished for blasting a foundation for a structure was subject to the materialman's lien for material "used in" the structure. (*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193, [20 Pac. 419].) By no stretch of the meaning of words could it be said that the powder was used "in the structure"; that is to say, in the language of the court in *Stimson Co. v. Los Angeles Traction Co.*, 141 Cal. 30, [74 Pac. 357], "as the materials of which it is constructed." But it may be said that the powder so used is consumed, in a very real and intimate sense, in the construction of the building. This application of the term may be made most appropriately to the material used in the forms for concrete. They do not become a part of the finished structure, but they are consumed as a part of the actual construction, or, even it may be said, as part of the structure. When the concrete walls are first poured they have of themselves no more stability than walls of sand. The forms hold them in shape until the concrete hardens, and perform a part, temporarily at least, essential not only to the erection but to the support of the building; and if their substance or their value is consumed in this purpose, may it not be said that these materials have been consumed in and as part of the building?

As has been pointed out, none of the decisions relied upon to exclude the lienability of materials thus used has dealt with the quality of use covered by the words "consumed in," of the amended statute; and it may even be questioned if there is justification in any of the decisions for the limitation of the words, "used in" to materials that have actually entered into and become a physical part of the structure. The code does not say that the materials must have been used in the building, or in the structure of the building, but that they must have been used in the *construction* of the building—in the actual process of erecting the building; and, so far as the decisions have been called to our attention, while they have used the broad language that the use must be such as to enter into and become a part of the finished building, they have, in restricting the application of the lien law, practically dealt with materials which were only used as an aid to, or preparation for, the work of actual construction, and not as a part of the actual construction of the building itself.

In the case of *Stimson Mill Co. v. Los Angeles Traction Co.*, *supra*—so much relied on by appellant here, and in which the rule contended for by appellant is most strongly stated—the material in question was lumber used by the contractor for a railway bridge, in building a temporary timber trestle to support the stringers, ties, and rails of the railway, because of delay in the delivery of the steel and other material of which the finished supports were to be made. This work was obviously no part of the construction contemplated by the contract, but a temporary makeshift to avoid delay in other parts of the work. The commissioner's opinion in that case, holding these materials not covered by the lien law of our codes, after stating the rule that the materials to be within the code provision must be furnished "to be used, and must actually be used," in the construction of the building, makes use of the following language: "And this, we understand, means that the materials must be used, not merely in the process of construction, but in the structure—that is to say, they must be used as the materials of which it is constructed." (Citing *Hamilton v. Delhi Min. Co.*, 118 Cal. 153, [50 Pac. 378]; *Silvester v. Coe Quartz Mine Co.*, 80 Cal. 513, [22 Pac. 217]; *Gordon Hardware Co. v. San Francisco etc. R. R. Co.*, 86 Cal. 620, [25 Pac. 125].) We have examined the foregoing citations and fail to find a suggestion in either the facts of the

cases stated or in the language of the decisions to give support to any rule or construction which would exclude from the application of the lien law materials furnished and used in a way to exhaust their substance or value, in the actual process of construction, whether or not they become a part of the finished structure.

Appellant relies upon, and quotes at length from, *California-Portland Cement Co. v. Wentworth Hotel Co.*, *supra*, and especially emphasizes the following quotation from the opinion: "The counter-line of decisions holding that such liens are given only where the materials have actually entered into and become a part of the structure are reasoned out on a line of argument having as a basis the theory that liens of the variety mentioned are provided to be given upon the assumption that the property to which they are made to attach has been improved and its value enhanced by the labor bestowed or materials furnished; hence, that where such labor or materials do not actually enter into the structure, no lien results. To the latter effect are all of the California cases." (Citing *Stimson Mill Co. v. Los Angeles Traction Co.*, *supra*, and all the cases on this point therein referred to, together with a number of additional California decisions.) The matter before the court in the *Wentworth Hotel* case was a claim of lien for materials furnished for, but, owing to a change in the plans of the building, never used in the building or in connection with it; and the appellate court in its decision had no reference to materials actually used and consumed in the process of construction of a building, though not entering into the finished structure. The argument of the court and the authorities cited fit the facts and the issues before it, but neither the one nor the other has the remotest application to a state of facts where the materialman has contracted and furnished materials whose substance and value have gone into the actual process of building, and have materially enhanced the value of the completed structure, though not remaining as part of it. This distinction is recognized in the case of *Pacific Sash & Door Co. v. Bumiller*, 162 Cal. 664, [41 L. R. A. (N. S.) 296, 124 Pac. 230], holding that lard oil applied to threads of joints, and soapstone on the inside of pipes, were covered by the materialman's lien. In this opinion this significant language is used: "Soapstone was used on the inside of pipes as lubricant to facilitate the pulling of wires through the pipe. This being a

part of the work of construction, we think it may also be considered as part of the material used in construction for which a lien may be claimed."

There are many decisions from other states on this precise question of application of the lien laws to materials for forms in the erection of concrete buildings, and they are somewhat in conflict. Many of these have been considered in the opinion of the court of appeal in *Olson-Mahoney Co. v. Dunne Inv. Co.*, *supra*, and no useful purpose would be served by attempting to review them here. It is our opinion, however, that the weight of authority and better reasoning sustains the doctrine of lienability of such materials where used and consumed in the actual work of construction. The conclusion goes only to materials used and consumed in the forms as part of the process of actual construction. There obviously can be no claim of lien for material retaining its identity as lumber, which, after its use in the forms in the building for which it was furnished, is taken down by the contractor and removed for use elsewhere. Material so removed, to the extent, at least, that it retains its value and identity, cannot be said to have been used or consumed in the construction, in the sense contemplated by the code.

[5] But what logical reason can be assigned for denying the claim of lien to that proportion of the material so furnished, which, either as to its substance or its value, has actually entered into and been consumed in the work of construction? There can be no injustice to the owner of property which is properly chargeable with the full value of lumber totally consumed in such a use, in making his property liable for half the material, if one-half is consumed, or one-half the value, if its value is depreciated one-half by the use. Neither does there appear to be any practical difficulty in arriving at a just estimate of values on this basis. In this case some of the lumber for forms was used over and over again in different stages of the construction, so as to practically destroy its commercial value for any purpose. Some of it was sawed up into short and irregular lengths, so as to destroy its further use and identity as lumber. Some of it was but slightly depreciated in value, or changed in form, and when removed had a commercial value of perhaps one-half its original price. The court found, on all the evidence, that, in the aggregate, ninety per cent in value of all the lumber used in forms was con-

sumed in that use. If this finding was justified by the evidence, it accurately fixes the measure of value of the material which, through the use of these forms, went into defendant's building.

This method of fixing the liability for the use of material in concrete forms has been adopted by the courts of a number of other states, and we see no reason why it is not logical and fair. In *Darlington L. Co. v. Westlake Co.*, 161 Mo. App. 723, [141 S. W. 931], the court says: "Where certain material is provided for in the contract in the erection of a structure, and is furnished and used accordingly, and is either in whole or in part consumed in its use, the materialman is entitled to a lien for the material thus consumed in the erection of the structure to the extent of the consumption of its reasonable value, regardless of the fact whether or not such material formed a permanent part of the structure when completed. Consumption of value means a depreciation in the market value of the material by the use provided for by the contract." Relating to a claim of lien for material used in forms for a concrete building, where the value of a portion of the material was only partly destroyed, the supreme court of Wisconsin, in *Moritz v. Lewis Const. Co.*, 158 Wis. 49, [51 L. R. A. (N. S.) 1040, 146 N. W. 1120], says: "Nor do we see any valid reason for denying a lien for the amount of depreciation of the remaining twenty-five per cent of the lumber used for shoring. This lumber was likewise used in the construction of the building, but in such use was not wholly consumed, but was consumed or destroyed to the extent found by the court below, and for which amount of destruction or consumption a lien was awarded." (To the same effect, *Barker & Stewart Lumber Co. v. Marathon Paper Mills Co.*, 146 Wis. 12, [36 L. R. A. (N. S.) 875, 130 N. W. 866]; *Chicago Lumber Co. v. Douglas*, 89 Kan. 308, [44 L. R. A. (N. S.) 843, 131 Pac. 563].)

[6] 4. The next point urged is that there is no evidence in this case to support the allegation of the complaint and finding of the court "that all of the material was sold to be used in the erection and construction of said buildings." It must be confessed that there is little or no direct evidence in the record of an express agreement to this effect. Appellant says that "proof of such an agreement or understanding between Dowell [the contractor] and respondent is absolutely essential to the maintenance of respondent's judgment," and that

"we cannot infer that there was such an agreement." Proof that there was such an agreement or understanding is essential, but we do not agree with counsel for appellant that such agreement cannot be established by inference. If there is sufficient evidence as to the circumstances and negotiations of the contract and delivery of this material to give rise to a legal inference that the parties arrived at such an understanding, the court can base its finding thereon, without a word of direct testimony as to such agreement or understanding. (Code Civ. Proc., secs. 1832, 1959, 1960; *Savings & Loan Soc. v. Burnett*, 106 Cal. 514, [39 Pac. 922].) The force of all indirect evidence rests on inference. There is some evidence in the record here tending to support, by logical inference, the finding of the court that it was definitely understood between the parties that this lumber was furnished to be used on these particular buildings; and in view of the entire absence of any testimony, circumstance, or condition to the contrary, we are not prepared to say the trial court was not justified in its finding. The material as ordered was to be delivered, and was delivered, at the place where these buildings were being constructed, and which was not the place of business of the contractor, Dowell, except for this particular contract. This destination of delivery was entered on the bills of respondent for all the numerous orders of lumber. It appears from the testimony of the contractor that he ordered the material for these buildings. Fred Westfall, the estimator for respondent, was asked by counsel if he estimated the lumber "that was sold to Mr. Dowell for the Bosworth buildings," and if he knew the market value of the lumber that was sold at that time, and he gave the prices as shown by the lists of the entire order. These facts, taken in connection with the generally known and established custom of dealers to charge materials so furnished to the particular job on which they are used, furnishes some evidence, though slight, as to an agreement and understanding of the parties. There can be little excuse for a lien claimant allowing his contract, in this material particular, to rest upon such slight showing; but where the moral probabilities as to the transaction are so strongly with the respondent, we will not disturb the finding in his favor.

[7] 5. Appellant's sixth assignment of error arises upon the variance between the allegations of the complaint and the proof offered as to the contracts under which the buildings

were constructed. The complaint alleges a single contract; the evidence discloses three contracts for different parts of the work. No issue was made as to this point by the answer, but under a stipulation at the trial the matter becomes an issue here. It is contended by appellant that where the liability against defendants' property is shown to have accrued under three separate contracts, each covering a distinct part of the work, the items of the lien claim cannot all be lumped together and made chargeable on the entire job, irrespective of the contract under which they may have arisen. This possibly might be true under the mechanic's lien law prior to 1911, where the contracts had been made according to law and filed with the county recorder, or, under the amended law of 1911, where the liability of the owner had been limited by the execution of a bond as provided by section 1183. This case arises under the amended mechanic's lien law of 1911, and it does not appear that any bond was executed, and there is therefore no limitation on the liability of the owner for lien claims. It can make no difference to him whether the liens chargeable against this property arise under the one or the other of the contracts. It appears from the evidence that the three contracts were for buildings, or parts of buildings, all erected on the same property, and as part of a single plant or enterprise. Under these conditions we see no reason why the construction of the court reached in *Booth v. Pendola*, 88 Cal. 36, [23 Pac. 200, 25 Pac. 1101], does not apply here.

A similar and more pointed ruling on the same matter is made in the case of *Acme Lumber Co. v. Wessling*, *supra*, where the lien claims arose under several separate oral contracts, and the court held that "it was not necessary to the validity of the claim of lien that it should be set forth that the demand was based upon more than one contract, and then segregate and separately state the amount of each, even though the evidence adduced in support of the lien shows that the work and labor for which the lien is claimed was performed upon separate and distinct structures, under separate and distinct contracts." (Citing *Kritzer v. Tracy Eng. Co.*, 16 Cal. App. 287, [116 Pac. 700]; *Borsot on Mechanics' Liens*, sec. 408.)

[8] 7. The items charged up with this material for cartage seem to have been incorporated as part of the price of the total bill rendered for "material furnished," and were prop-

erly so included as part of the claim of lien for value of the materials. (*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, [22 Pac. 231]; *Woods, Curtis & Co. v. Eldorado L. Co.*, 153 Cal. 232, [126 Am. St. Rep. 80, 15 Ann. Cas. 382, 16 L. R. A. (N. S.) 585, 94 Pac. 877].)

[9] We are of the opinion that the plaintiff is entitled to enforce his lien for the material furnished and used in forms to the extent of the value consumed in such use; but are at a loss to understand how the trial court arrived at the valuation fixed by the findings. The evidence covering this question is confusing to the degree of being unintelligible, but, even then, assuming the correctness of the court's finding that all but ten per cent of the value of the lumber used in forms was consumed in that use, there is nothing in the findings determining the amount or value of the material which was used for forms. The total amount and value of all lumber furnished is found, but it appears from the evidence that some thousands of feet of flooring went into the buildings which was not used for forms. The value of this does not appear in evidence, and neither the value nor quantity appears in the findings, which leaves an indeterminate quantity, as well as value, of the lumber that was used and consumed in the forms. Again, after finding that ten per cent of the value of the lumber used for forms was not consumed in such use, the findings fix the value of the salvage at only \$75, and the judgment is based on that deduction; whereas, on any basis of fact justified by the evidence, ten per cent of the value of material used in forms must have amounted to nearly twice that sum.

As we see no way of modifying the judgment, under the condition of the record, the case will be remanded for a new trial as to the one issue relative to the value of the material furnished and consumed in the construction of these buildings.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 2450. Second Appellate District, Division One.—February 26, 1919.]

CATHERINE R. RUPERD, Respondent, v. JOSEPH C. HUNTER et al., Appellants.

[1] **MONEY HAD AND RECEIVED—AFFIRMATIVE ISSUE RAISED BY ANSWER—JUDGMENT.**—In an action for money had and received, where the answer admitted the receipt of the money and set up affirmative matters in defense, the judgment, based upon findings adverse to the defendant as to the affirmative matters, is a judgment upon a cause of action set forth in the complaint, and not upon one which appears for the first time in the answer.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

George W. Perkins and C. F. Holland for Appellants.

Alfred H. McAdoo and Duke Stone for Respondent.

CONREY, P. J.—The defendant Joseph C. Hunter appeals from the judgment. The complaint is in three counts, but for the purpose of considering the contentions made by appellant it will be sufficient to refer to the first cause of action, together with the answer thereto and the findings of the court. The complaint alleges that on or about August 10, 1912, the defendants, in consideration of the sum of two thousand dollars received by them and in evidence of said indebtedness, executed their thirty-day note to the plaintiff for the sum of two thousand dollars; that after crediting payments made, there remained due and unpaid the sum of \$1,907.42. The answer of appellant denied the execution of the note, but admitted that on August 10, 1912, he received from plaintiff the sum of two thousand dollars. The answer then alleged as follows: "Alleges that for more than seven years last past, defendant Joseph C. Hunter has acted as business agent and advisor for this plaintiff, and that during all of said seven years defendant Joseph C. Hunter has attended to the investing and loaning of plaintiff's money. That said sum of two thousand dollars was received by defendant Joseph C. Hunter from this

plaintiff for the purpose of investing said sum of two thousand dollars for the benefit of this plaintiff. That said sum of two thousand dollars was so invested by defendant Joseph C. Hunter at the special instance and request of this plaintiff. That said sum of two thousand dollars was to be returned to plaintiff at such times and in such manner as said investments should allow or mature." The answer further alleged that this defendant has advanced to plaintiff the sum of \$1,568.03 for and on account of said sum of two thousand dollars.

The findings of the court are silent upon the subject of the execution of the note or the nonpayment thereof. The court did find, however, that "On or about August 10, 1912, the defendant Joseph C. Hunter received of plaintiff the sum of two thousand (\$2,000) dollars under an express agreement between plaintiff and said defendants for the purpose of investing the same for the benefit of the plaintiff, and it was agreed between plaintiff and said defendant that said sum of two thousand dollars was to be invested at two (2%) per cent a month and said defendant should pay the plaintiff one (1%) per cent a month while said money was so retained by him; and it was further agreed between plaintiff and said defendant that said sum was to be returned to plaintiff on thirty (30) days' notice from plaintiff to said defendant, and the court finds that the plaintiff demanded the return of said moneys and an accounting thereof more than thirty days before bringing this action; but that the said defendant has never rendered to the plaintiff an accounting for said moneys and has refused to return said moneys to the plaintiff, except the sum of one hundred fifty (\$150) dollars." The court further found that the defendant has never repudiated said trust agreement and the statute of limitations had not begun to run prior to filing this action; that it is not true that the defendant Joseph C. Hunter has advanced to plaintiff the sum of \$1,568.03 on account of said sum of two thousand dollars, and in truth and in fact said defendant has only advanced on said two thousand dollars the sum of \$150 and the sum of \$338.97, the latter items being advanced from time to time as interest payments. Based on the foregoing findings, the court awarded judgment to plaintiff against the defendant Joseph C. Hunter in the sum of two thousand dollars, with interest thereon at the rate of

one per cent a month from August 10, 1912, until date of judgment, less credits allowed in accordance with the findings.

The record consists of the judgment-roll and a bill of exceptions. The bill of exceptions contains a notice of intention to move for a new trial, with a statement showing that the motion for new trial was duly presented and the motion denied. The grounds of the motion for new trial included a statement "that said decision is against law." The bill of exceptions does not contain any of the evidence received, or any of the rulings of the court thereon.

[1] Appellant contends that the decision was against law in this, that the court failed to make findings of fact upon the issues presented by the complaint, "but instead has found in favor of plaintiff on an entirely different cause of action than that presented by the pleadings, while the findings are silent as to the real issues of the case." The facts appear to be, however, as we may infer from the findings, that the case was tried upon the affirmative issues tendered by the answer, which showed that the defendant had received the sum of two thousand dollars from the plaintiff in trust for stated purposes, but alleged that nearly one thousand six hundred dollars thereof had been returned. Presumably in accordance with the evidence produced at the trial, the court found that a very much smaller sum had been returned, and rendered judgment for the actual balance remaining in defendant's hands. So far as the record shows, it may be that no evidence concerning the execution of the note was received at the trial, and it may be assumed that such note was not executed. If the defendant had rested upon his denial with respect to the note, perhaps that would have been sufficient to dispose of the action in his favor, leaving the plaintiff free to maintain another action upon defendant's indebtedness to her. Since the defendant chose to anticipate such a proceeding by an affirmative statement of facts raising the actual issues of the case, we cannot see that he is in a position to complain of the result at this time. Presumably he permitted the court, without objection on his part, to try and determine the controversy, as seems to have been done. The answer, while denying the execution of the note, asserted that this defendant received the plaintiff's money at the time stated in the complaint, but alleged that it was received for the purpose of investing the same in loans for the benefit of the plaintiff, and

that those loans were made. The answer did not deny that all of those loans had been repaid to the defendant. The real question at issue seems to have been with respect to the amount that had been repaid by appellant to plaintiff. On that issue we must assume that the findings of fact are in accordance with the evidence. The conclusion at which we have arrived in this matter is in harmony with the opinion of the third district court of appeal as stated in *Boyle v. Coast Improvement Co.*, 27 Cal. App. 714, [151 Pac. 25], and *Slaughter v. Goldberg, Bowen & Co.*, 26 Cal. App. 318, [147 Pac. 90]. In each of those cases the supreme court denied an application for a rehearing. As was said in the *Slaughter* case: "It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue." It has been held directly that where an answer raises an issue not presented by the complaint, and upon which a judgment might be based, such pleadings are a sufficient basis for the judgment. (*Grangers' Union v. Ashe*, 12 Cal. App. 757, [108 Pac. 533]. See, also, *Abner Doble Co. v. Keystone etc. Co.*, 145 Cal. 490, [78 Pac. 1050]; *Vance v. Anderson*, 113 Cal. 532, [45 Pac. 816].)

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919, and the following opinion then rendered thereon:

THE COURT.—The opinion of the district court of appeal may possibly be taken as holding that a judgment for plaintiff may be sustained upon findings adverse to the defendant upon affirmative allegations of the answer, although the cause of action to which such allegations and findings are responsive is not one set up in the complaint. If this is the construction to be put on the opinion, we are not willing to concur without further consideration. But, in fact, this question is not involved. The complaint as amended is in reality one for money

had and received. The answer admitted the receipt of the money and set up affirmative matters in defense, and to these last-mentioned matters the findings are responsive. The judgment upon these findings is, therefore, a judgment upon a cause of action set forth in the complaint and not upon one which appears for the first time in the answer. A hearing in this court is, therefore, denied.

Olney, J., Shaw, J., Melvin, J., Lawlor, J., Wilbur, J., and Lennon, J., concurred.

Angellotti, C. J., concurred in the order denying a hearing in the supreme court.

[Civ. No. 2311. Second Appellate District, Division One.—February 27, 1919.]

BROK MICKSCHL, Respondent, v. THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY (a Corporation), Appellant.

- [1] **FRATERNAL INSURANCE—ACTION ON POLICY—BREACH OF WARRANTY—BURDEN OF PROOF.**—In an action to recover upon a fraternal insurance policy, the burden of proving the falsity of the representations made by the insured upon which the policy was issued devolved upon the defendant.
- [2] **ID.—CAUSE OF DEATH OF MOTHER OF INSURED.**—Where, in an action on a fraternal insurance policy, the defense was breach of warranty by the insured in making a false representation that her mother died of pneumonia when she had in fact died of pulmonary tuberculosis, the finding of the court to the effect that the mother's death was caused by pneumonia was supported by the evidence.

APPEAL from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. M. Willis and William Guthrie for Appellant.

Allison & Dickson for Respondent.

SHAW, J.—Plaintiff, as beneficiary therein, sought to recover upon an insurance policy issued by defendant to Norma Grace Mickschl. The answer alleged a breach of warranty on the part of the insured in that she falsely represented that the death of her mother, Mrs. Gould, was due to an attack of pneumonia, whereas, in fact, her death was due to pulmonary tuberculosis. Judgment went for plaintiff, from which defendant appealed.

Appellant's sole contention, in which there is no merit, is that the finding of the court to the effect that the death of Mrs. Gould, the mother of the insured, was caused by an attack of pneumonia, as represented by her, and not from pulmonary tuberculosis, as alleged by the defendant, is not supported by the evidence.

[1] The burden of affirmatively proving the falsity of the representation made by the insured, and upon which the policy was issued, devolved upon defendant (Code Civ. Proc., sec. 1981; *Penn Mutual L. Ins. Co. v. Mechanics' Sav. Bank*, 38 L. R. A. 33-69, note), which called Dr. Strong as the only witness, who testified touching the cause of Mrs. Gould's death. Referring to the certificate of death prepared by the witness and wherein the cause of death was given as pulmonary tuberculosis, he stated that he first saw Mrs. Gould on her deathbed, at which time, after breathing not more than half a dozen times after he entered the room, she died as the result of a hemorrhage which he presumed was caused by tuberculosis, from which disease, in his opinion, she was suffering at the time of her death. On cross-examination, however, the witness stated that he was not positive that the deceased had pulmonary tuberculosis, since, in the absence of an autopsy, the only positive test in the determination of such fact would be a microscopic examination of the sputum, which was not made, and when asked the direct question, if at the time of her death she had pneumonia, replied: "That I could not say, but the immediate cause of her death was the hemorrhage, and not the tuberculosis." He further stated that he was not willing to swear positively that the woman did not die from the effects of pneumonia. "She may," said the witness, "have had pneumonia, but the immediate cause of the death was the hemorrhage," and again repeated that he was not prepared to swear that she did not have pneumonia. He further stated

the hemorrhage might have been due to other causes than tuberculosis, and that it was not impossible that the hemorrhage was caused from pneumonia.

[2] In view of the fact that Mrs. Gould died almost immediately upon the arrival of this physician, who then saw her for the first time, the testimony given by him was, as determined by the court, insufficient to prove the affirmative allegation contained in defendant's answer, that the warranty made as to the cause of Mrs. Gould's death was untrue, and in the absence of such proof the truth thereof is presumed. (*Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 378, [23 L. Ed. 610, see, also, Rose's U. S. Notes]; *Yore v. Booth*, 110 Cal. 238, [52 Am. St. Rep. 81, 42 Pac. 808].)

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2048. Second Appellate District, Division Two.—February 27, 1919.]

ROSE L. REED, Respondent, v. WILLIAM R. REED,
Appellant.

- [1] **DIVORCE—ALIMONY PENDENTE LITE AND SUIT MONEY—ORDER WITHOUT NOTICE—JURISDICTION.**—In an action for divorce, where the court has acquired jurisdiction of the person of the husband, it has the power to order, *ex parte*, without any previous notice, the payment to the wife of any reasonable sum for alimony and suit money.
- [2] **ID.—AMOUNT ALLOWABLE AS SUIT MONEY—DISCRETION OF TRIAL COURT.**—Discretion is vested in the trial court as to the amount to be allowed the wife as suit money to enable her to prosecute or defend an action for divorce, and only a plain case of abuse of discretion is subject to correction by an appellate court.
- [3] **ID.—ORDER ALLOWING SUIT MONEY—APPEAL UNDER ALTERNATIVE METHOD—AMOUNT CLAIMED TO BE UNNECESSARY OR EXCESSIVE—APPELLANT'S BRIEF INSUFFICIENT.**—On appeal from an order allowing a wife alimony and suit money in an action for divorce, where the appeal is taken under the alternative method and the record is brought up on a typewritten transcript and the appellant contends that the amount allowed was unnecessary or excessive, it is incumbent upon the appellant to print in his brief so much of the

evidence as will enable the appellate court to say that there was no necessity for any sum whatever or that the sum allowed was so excessive as to amount to an abuse of discretion.

- [4] **ID.—ALLOWANCE FROM TIME OF COMMENCEMENT OF ACTION—INCLUDING EXPENSES OF PAST SUPPORT.**—In a proper case payment of alimony may be made to date from the commencement of the action, thus including the expenses of the wife's past support, and where none of the evidence is brought up, so that the appellate court has no means of knowing whether the evidence did or did not show a necessity for such allowance for past support, every reasonable intendment must be indulged in favor of the correctness of the proceedings and the regularity of the order.

APPEAL from an order of the Superior Court of Kern County. Howard A. Peairs, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. R. Dorsey for Appellant.

R. H. Wilson for Respondent.

FINLAYSON, P. J.—This is an appeal from an order requiring defendant to pay plaintiff a certain amount monthly as alimony for her support *pendente lite* and another certain sum as suit money to enable her to prosecute the action.

The action was commenced by plaintiff to obtain a divorce. Her complaint, filed January 9, 1915, contained allegations showing her indigent circumstances and defendant's possession of community property worth several thousand dollars, and prayed for alimony for her support and suit money. On March 22, 1915, defendant answered. On June 16, 1915, plaintiff served and filed a notice that, on June 21, 1915, she would apply to the court to have the cause set for hearing on the issues tendered by her complaint as to alimony *pendente lite* and suit money. Thereafter, by consent of both parties in open court, the motion was continued to June 28, 1915. On the last-mentioned date the matter again was continued, by consent of both parties in open court, this time to July 2, 1915, on which date the matter duly came on for hearing, witnesses were sworn and testified, and, on July 29, 1915—the matter having regularly been continued to that date—the court made an order directing defendant to pay plaintiff \$750 as and for suit money, for the purpose of defraying the ex-

penses that she may be put to in producing her evidence, taking the depositions of her witnesses, and other expenses connected with the litigation; and likewise directed defendant to pay plaintiff \$50 per month for her maintenance, commencing January 9, 1915—the date when the action was brought.

Defendant contends: (1) That the court was without jurisdiction to make the order, for the reason that there was no proper application for alimony or suit money; (2) That there was no evidence showing a necessity for the allowance of \$750 as suit money; and (3) That the court had no power to allow plaintiff alimony for her support during the period intermediate to the commencement of the action and the date of her application for an allowance. On the record, as it comes to us, none of these objections is tenable.

1. We think the notice served and filed June 21, 1915, and the subsequent stipulations relative to continuances, together with the issues tendered by the complaint relative to alimony and suit money, were sufficient to empower the court to make the order for suit money and support *pendente lite*, even if jurisdiction were dependent upon any formal notice. [1] However, contrary to appellant's assumption, no notice was necessary. The defendant had appeared in the action, so that the court had acquired jurisdiction, not only of the subject matter of the action, but of the person of the defendant. Having acquired such jurisdiction, the court had the power to order, *ex parte*, without any previous notice, the payment of any reasonable sum for alimony and suit money. (*Mudd v. Mudd*, 98 Cal. 320, [33 Pac. 114]; *Ex parte Joutsen*, 154 Cal. 541, [98 Pac. 391]; *Glass v. Glass*, 4 Cal. App. 604, [88 Pac. 734].) "Such order may be made *ex parte*, and is usually so made." (*Glass v. Glass*, *supra*.) Appellant cites *Baker v. Baker*, 136 Cal. 302, [68 Pac. 971]. That case can have no application here, for there the court undertook to make an allowance to the wife before it had acquired jurisdiction of the person of the husband, either by service of process or by his voluntary appearance. That it could not do. The obligation of a husband to support his wife is personal, and therefore an order for alimony—in effect a final judgment for money (*Sharon v. Sharon*, 67 Cal. 185, [7 Pac. 456, 635, 8 Pac. 709])—is a judgment *in personam*, and void unless the husband has voluntarily appeared in the action or has been duly served with process. (14 Cyc. 745.)

[2] 2. It must be conceded, and indeed it is not questioned, that a discretion is vested in the trial court as to the amount to be allowed the wife as suit money to enable her to "prosecute or defend the action" (Civ. Code, sec. 137), and that only a plain abuse of discretion is subject to correction by an appellate court. [3] Where, as here, it is contended that no evidence was adduced at the hearing showing a necessity for the allowance of a particular sum as suit money, it is incumbent upon the appellant to bring up so much of the record as will suffice to show either that no amount whatever should be allowed or that the sum allowed is so excessive as clearly to indicate an abuse of discretion. Here the appeal is taken under the alternative method. Much evidence was adduced in the lower court. The hearing extended over three or four days. The reporter's transcript covers some two hundred typewritten pages. None of the evidence is printed in the briefs, or in any supplement appended thereto, as required by section 953c of the Code of Civil Procedure, save a very small part designed to show that, under the doctrine of such cases as *Sharon v. Sharon*, 75 Cal. 1, [16 Pac. 345], and *White v. White*, 86 Cal. 212, [24 Pac. 1030], the \$750 cannot be deemed to include counsel fees, for the reason that respondent's counsel had agreed to prosecute her action for a contingent fee. But even if the \$750 did not include any allowance for counsel fees—and we shall assume it did not—nevertheless it is incumbent upon appellant to print in his briefs so much of the evidence as will enable us to say that there was no necessity for any suit money whatever, or that the sum allowed was so excessive as to amount to an abuse of discretion. This appellant has failed to do. The permission given to an appellant to file a typewritten transcript in lieu of a printed bill of exceptions casts no burden upon the appellate courts to examine the typewritten documents. (*California Sav. Bank v. Canne*, 34 Cal. App. 768, [169 Pac. 395].)

Though no burden rests upon us to do so, we have looked into the typewritten transcript and there learn that the pleadings tendered issues respecting property rights of considerable value; that it will doubtless be necessary to take the deposition of a witness in Texas, one Paggi, whose deposition was used at the hearing on the motion for alimony; and that this witness has some knowledge respecting appellant's stockholdings and his general financial condition. The trial court was

justified in indulging the inference that, before a trial on the merits, the deposition of this witness should be taken again, and his knowledge of important facts thoroughly probed. If such deposition be taken in Texas upon oral questions and answers—and it is possible that that course will best subserve the ends of justice—the employment of counsel in Texas, or the traveling expenses of respondent's present counsel, necessarily will use up quite a considerable part of the total allowance of \$750. This, though but one illustration of a possible item of expense that may have been in the mind of the lower court, will serve to show the impossibility of an intelligent consideration of appellant's point in the absence of a printed transcript of so much of the evidence as will at least negative the presumption of regularity in the order complained of.

3. In support of his contention that the court erred in allowing alimony from the date of the commencement of the action, instead of from the date of respondent's application therefor, appellant relies upon the rule announced in *Loveren v. Loveren*, 100 Cal. 493, [35 Pac. 87], where it is held that an allowance to the wife of suit money to enable her to prosecute or defend the action can only be made as to expenses necessary to be included in the future prosecution or defense of the action, and cannot be made for the payment of past expenses, "except where such payment is necessary to be made in order to enable the wife to further prosecute or defend her action."

[4] Assuming, for the purpose of this decision only, that the rule as to alimony for maintenance and support is the same as that respecting suit money for expenses, nevertheless there are cases where it is proper to make an allowance of alimony for maintenance and support from the date of the commencement of the action to the time of the application therefor. For example, if application for alimony is not made until some months after the commencement of the action, and if, in the meantime, the wife has managed to exist only by borrowing money wherewith to pay for the necessities of life, or if, during this period, because of her indigent circumstances, she has gone without many things suitable to her condition in life, it is manifest that, to place her in such a situation that in the future she may be enabled to live upon the allowance provided to be paid for her future support—if that amount is no more than sufficient for that purpose—provision ought likewise to be made for her past expenses incurred subsequent to the com-

mencement of the action, otherwise she would be compelled to pay out of the allowance for her future support the money she had previously borrowed, or purchase with the money allowed her for her future support the things she should have had in the past, but which, because of her poverty, she was unable to purchase at the time. (*Gay v. Gay*, 146 Cal. 237, [79 Pac. 885].) In the *Gay* case it is said: "If, then, it be conceded that . . . the rule laid down in *Loveren v. Loveren*, with reference to reimbursement for costs and expenses of the wife in an action for divorce, should apply to an application by the wife for support and maintenance, still . . . the rule that payments for past expenses shall not be allowed is not absolute, but is subject to the qualification that such an order may be made whenever it appears that such payment is necessary to enable the wife to further prosecute or defend her case. And the same qualification as to the rule should apply to applications by the wife for support. If it should appear to the court that it was necessary, in order to insure the support of the wife upon the amount to be paid to her periodically in the future, that existing wants or expenses incurred by her should be provided for, the court, within the qualifications announced above, would have the right to do so." (146 Cal. 242, 243, [79 Pac. 888].)

Whether the evidence adduced before the trial court did or did not present a case showing a necessity for an allowance for past support in order to insure respondent's future maintenance out of the sums to be paid to her in the future, we have no means of knowing, for none of the evidence has been printed in the briefs, saving that which relates exclusively to the agreement of respondent's counsel to prosecute her action for a contingent fee, and every reasonable intendment and presumption must be indulged in favor of the correctness of the proceedings below and the regularity of the order.

Order affirmed.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 2501. Second Appellate District, Division One.—February 27, 1919.]

IDA R. BECKETT, Respondent, v. Z. B. STUART, Appellant.

- [1] **APPEAL—FORMER APPEAL—RECORD.**—Documentary evidence before the court on a former appeal, none of which is in the record of a second appeal, is not before the court for the purpose of such second appeal.
- [2] **ID.—LAW OF THE CASE—SECOND TRIAL—DIFFERENT FACTS.**—The decision rendered by a trial court on a second trial after an appeal is not in conflict with the "law of the case" as established on the former appeal, when the case on second trial as shown by the findings is very materially different in its facts from the case as stated in the former decision by the appellate court.

APPEAL from a decision of the Superior Court of Los Angeles County. John W. Shenk, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

J. W. Hocker for Appellant.

Rupert B. Turnbull, Joe Crider and Hugh Kelley for Respondent.

CONREY, P. J.—The defendant appeals from the judgment entered herein on the ninth day of February, 1917. On appeal from a former judgment in this action the judgment was reversed (23 Cal. App. 373, [138 Pac. 115]). After a second trial of the action judgment has been entered a second time in favor of the plaintiff. The pleadings have not been amended and the issues at the second trial were the same as at the first trial. In the former decision on appeal this court said: "In this action plaintiff alleged that she intrusted to defendant for the purpose of collection a certain note and mortgage then owned by her, executed by one Juliet Burns, upon which there was due and payable the sum of one thousand five hundred dollars; that on December 30, 1909, said Burns paid the same to defendant, who appropriated it to his own use and refused to pay the same or any part thereof to plaintiff. These allegations, other than the refusal to pay, are denied by

the answer, which further alleged that in December, 1909, said Burns paid to defendant the sum of one thousand five hundred dollars for the use of one Sarnighausen, who on December 22, 1909, made and delivered to plaintiff his note therefor, which said sum was at the time a loan made by plaintiff to Sarnighausen, of the funds then belonging to her in the hands of said Burns; that on July 12, 1910, for a valuable consideration, plaintiff sold and transferred to defendant said note so made to her by Sarnighausen. . . . If, as alleged in the answer, plaintiff, prior to the bringing of the suit, to wit, on July 12, 1910, for a valuable consideration, sold and delivered said promissory note to defendant, such fact would constitute a sufficient defense to the action. Moreover, the affirmative allegation of the answer that on July 12, 1910, plaintiff, for a valuable consideration, sold and transferred the note to defendant, which as such constituted a defense, tendered a material issue, as to which defendant was entitled to a finding by the court. For this reason, if for no other, the judgment should be reversed; and it is so ordered."

The evidence received by the court at the second trial is not before us on appeal, the appeal being upon the judgment-roll alone. The findings of the court upon which the present judgment rests are fully responsive and adverse to the affirmative defense contained in defendant's answer. The facts, which are fully set out in the findings, show that the Sarnighausen transaction was a subterfuge, under and by means of which appellant applied the plaintiff's money to his own use without her knowledge or consent. Further, "the court finds that it is not true that the amount evidenced by said Sarnighausen note or any sum or at all was ever loaned by the plaintiff, Ida R. Beckett, to said F. Sarnighausen, and the court finds that it is not true that on the twelfth day of July, 1910, or at any time or at all, for a valuable consideration plaintiff sold, assigned, and delivered said promissory note to the defendant. The court finds that subsequent to the execution of the Sarnighausen note, to wit, the note executed by said F. Sarnighausen in favor of Ida R. Beckett, the said Ida R. Beckett indorsed said note to Z. B. Stuart, the defendant herein, for the purpose of collection and for such purpose only; that at no time was the said defendant, Z. B. Stuart, the owner of or entitled to the proceeds of said note. The court finds that at the time of the indorsement of said note by the plaintiff to the

defendant for the purpose of collection the said plaintiff was not apprised of the actual transaction by which the said F. Sarnighausen had made, executed, and delivered said note in favor of the plaintiff and at said time plaintiff had no knowledge of the real facts of said transaction.

"The court finds that the instrument purporting to be an assignment of the Sarnighausen note in favor of the defendant, Z. B. Stuart, and purported to have been executed by the plaintiff, Ida R. Beckett, which instrument is marked defendant's exhibit 4, was not signed by Ida R. Beckett, and that the signature thereon purporting to be that of Ida R. Beckett is not her signature."

Appellant's assignments of error are: 1. That the court erred in rendering a judgment not supported by the pleadings and findings. 2. That the court erred in rendering judgment based upon findings outside of the issues joined by the complaint and answer. 3. That the court erred in failing to apply the law of the case as announced by the appellate court on the former appeal. None of these contentions can be sustained. The cause of action set forth in the complaint was for moneys of the plaintiff, received by the defendant and wrongfully retained by him. The facts alleged were established, and the affirmative defense was refuted. The court did not base its judgment upon findings outside of the issues presented by the pleadings. The decision rendered is not in conflict with the law of the case as established on the former appeal. [1] We do not agree with the claim of counsel for appellant that the documentary evidence before the court on the former appeal (none of it being in the present record) is before us for the purposes of this appeal. [2] The case on second trial, as shown by the findings, is very materially different in its facts from the case as stated in the former decision made by this court.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919.

All the Justices concurred.

[Civ. No. 2551. Second Appellate District, Division One.—February 27, 1919.]

PATTEN & DAVIES LUMBER COMPANY (a Corporation), Respondent, v. CHARLES T. INMAN, Appellant.

- [1] **APPEAL—ALTERNATIVE METHOD—JUDGMENT—INSUFFICIENT BRIEFS.** On an appeal under the alternative method permitted by section 953a of the Code of Civil Procedure from a judgment based on an order granting a nonsuit, where the appellant insists that the court erred in granting the motion for the nonsuit, the omission of the appellant to print in his brief any portion of the record showing, as required by section 953c of said code, that the court erred in granting the motion, is sufficient ground to justify an affirmance of the judgment.
- [2] **DRAFTS—ACCEPTANCE AS AGENT—NONSUIT AS TO ALLEGED PRINCIPAL—AGENT NOT PARTY AGGRIEVED.**—Where, in an action against one who has accepted a draft, the defendant answered alleging that in accepting the draft he acted as agent for a third party, who at the request of the acceptor was brought in and made a party defendant but without any affirmative relief being demanded against him by the original defendant, and the trial court thereupon granted a motion for a nonsuit of the party thus brought in, the original defendant, even conceding the ruling to be erroneous, was in no position to complain.

APPEAL from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. C. Millsap for Appellant.

Behymer & Craig for Respondent.

SHAW, J.—In this action plaintiff sued to recover upon a draft drawn by William Durflinger upon and accepted by Charles T. Inman. In his answer Inman alleged that in accepting the draft he acted for and as agent of one F. H. Richman, and asked that he be made a party defendant to the action. Thereupon plaintiff filed an amended complaint making Durflinger, Inman, and Richman parties defendant, and wherein it was alleged that Inman in making the draft acted for and as agent of Richman. Durflinger suffered default.

Richman filed an answer putting in issue the question of Inman's alleged agency in acting for him, and the result of the trial was that, at the close thereof, the court made an order granting Richman's motion for a nonsuit, and gave judgment in favor of plaintiff as against Inman, from which he has appealed.

While appellant states that he is "unable to find an error which would justify the reversal of the judgment in so far as the plaintiff is concerned," he nevertheless insists that the court erred in granting Richman's motion for a nonsuit.

[1] The record is presented in accordance with the method provided in section 953a of the Code of Civil Procedure, but, conceding appellant's right to have the alleged error reviewed, he omits to print in his brief any portion of the record showing, as required by section 953c of the Code of Civil Procedure, that the court erred in granting the motion. This alone, upon the authority of *Jones v. American Potash Co.*, 35 Cal. App. 128, [169 Pac. 397], and *Anderson v. Recorder's Court*, 36 Cal. App. 123, [171 Pac. 812], is sufficient ground to justify an affirmance of the judgment.

[2] It appears, however, that while defendant in his answer alleged that in accepting the draft he acted as agent for Richman, he demanded no affirmative relief, but contented himself by asking that Richman be brought in by plaintiff as a party to the action; hence it is apparent that Inman is not aggrieved by the ruling. He, conceding the ruling erroneous, is in no position to complain because the court denied plaintiff the relief which it asked against Richman.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2716. Second Appellate District, Division One.—February 27, 1919.]

S. J. WHITE, Appellant, v. B. S. GREENWOOD et al.,
Respondents.

- [1] **VENDOR AND VENDEE — EXCHANGE OF RANCH AND PERSONAL PROPERTY—FRUIT TRAYS “NOW” SITUATED ON PROPERTY—CONSTRUCTION OF CONTRACT.**—A contract for an exchange of a ranch and “all the following described personal property now situate” thereon, describing, among other things, “all trays and boxes,” included only fruit trays on the ranch at the date of the contract and did not include fruit trays which at the time of the contract were, and for a period of a year or more had been, in the possession of a third party on another ranch.
- [2] **ID.—CONTRACT UNAMBIGUOUS AND WITHOUT UNCERTAINTY — CONSTRUCTION—ASSUMPTION OF MORTGAGE.**—The contract being unambiguous and without uncertainty, the fact that in making the exchange the defendants assumed and agreed to pay as a part of the consideration on their part for the whole property an existing mortgage on the trays is unimportant as a means of interpretation.
- [3] **ID.—CONTRACT IN WRITING—RULE OF INTERPRETATION—INTENTION.** When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.

APPEAL from a judgment of the Superior Court of Kings County. M. L. Short, Judge. Reversed.

The facts are stated in the opinion of the court.

W. R. McQuiddy for Appellant.

Harris & Hayhurst and John G. Covert for Respondents.

SHAW, J.—This controversy grows out of a contract made by the parties for an exchange of real and personal property whereby defendants claimed plaintiff sold and agreed to deliver to them, with the ranch so conveyed, some two thousand fruit trays which at the time of the making of the contract were, and for a period of one year or more had been, in the possession of a third party upon another ranch and which trays defendants thereafter took into their possession.

Findings were waived and the court gave judgment for defendants, from which plaintiff appeals. Upon the record the only rulings that can be considered are those involving the interpretation of the written contract between the parties, and the admission and rejection of certain testimony. The clause of the contract upon which respondents relied and which the court construed as entitling them to the trays is as follows:

"The following described personal property now situate upon said real property in Kings County is to go with the said property in this transfer and to be considered a part of the same, to-wit: Four mules and harness for the same, one spraying outfit and its truck, all trays and boxes, two (2) sows, one (1) cow, one section harrow, one rotary harrow, two twelve-inch plows, one ten-inch plow, one small gang plow, one four-horse wagon, capital wagon, one vineyard truck, all tree props and hooks, all hay in barns, all panels and woven wire fences now on the ranch, also one light buggy, yellow gear."

[1] In construing the contract to include the two thousand trays in question the court erred. By the express terms thereof the only personal property which was to go with the realty so agreed to be conveyed was "the following described personal property *now situate upon said real property* in Kings County." The word "now" had reference to the date of the contract, at which time there was pointed out to the defendants for their inspection several thousand fruit trays piled upon the dry ground. They were not led to believe and, since they had no knowledge that plaintiff owned the two thousand trays elsewhere located, could not have believed that they would receive other than the trays on the ranch. If one contracts to buy a ranch with all the cattle thereon, his right to such livestock would, in the absence of a fraudulent removal, be restricted to those located thereon at the date of the making of the contract. He could not be heard to insist that such contract included cattle elsewhere located, because owned by the vendor. In our opinion, there is no ambiguity in the contract, but, conceding it ambiguous, there is nothing in the evidence which, upon applying the rules for interpretation found in title III of the Civil Code, could justify the conclusion of the trial court in the interpretation thereof. [2] It is true that in making the purchase defendants assumed and agreed to pay, as a part of the purchase money of the whole property transferred, an existing mortgage on the trays, num-

bering in all approximately fifteen thousand, but such fact is unimportant as a means of interpretation. It cannot be said that merely because one, as part of the consideration of a purchase, assumes and agrees to pay a mortgage on personal property, he is entitled to the property. [3] There is no uncertainty in the contract, and, applying the rule that "when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . , " we have no difficulty in reaching the conclusion that the court erred in construing the contract to cover and include the two thousand trays owned by plaintiff and located elsewhere than on the ranch so conveyed by plaintiff to defendants. This view renders it unnecessary to discuss other alleged errors.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2744. Second Appellate District, Division One.—February 27, 1919.]

HENRIETTA PAUL BOWMAN et al., Respondents, v. PROVIDENT REALTY INVESTMENT COMPANY (a Corporation), Defendant; S. C. PRATT, Appellant.

[1] **BANKRUPTCY — DISCHARGE — JUDGMENT BARRED — MOTION TO QUASH EXECUTION — ABSENCE OF FRAUD.**—On an appeal from an order denying a motion made by a defendant to quash an execution on a judgment on the ground that the judgment debtor had been released from the judgment by his discharge in bankruptcy, it is held that the judgment, which was entered by defendant's consent for money received by him from the plaintiff for a half interest in an inchoate land speculation which was never completed, was barred by the discharge, under subdivision 2 of section 17 of the Federal Bankruptcy Act, there being nothing disclosed by the complaint in the action from which the slightest inference could be drawn that the defendant obtained the money by false pretenses or representations, and there being no allegation therein of fraud or deceit practiced on the plaintiff by the defendant.

APPEAL from an order of the Superior Court of Los Angeles County. Grant Jackson, Judge. Reversed.

The facts are stated in the opinion of the court.

Heney & Carr for Appellant.

W. A. Martin for Respondents.

SHAW, J.—Defendant S. C. Pratt appeals from an order denying his motion to recall and quash a writ of execution issued upon a judgment theretofore rendered against him in favor of Henrietta Paul Bowman.

The motion was based upon the conceded fact that subsequent to the rendition of said judgment Pratt was duly adjudged a bankrupt by the United States district court and, in October, 1916, an order was duly made for his discharge as such. The judgment was included in Pratt's schedule of liabilities, and Bowman's claim based thereon allowed in February, 1917. Thereafter, in October, 1917, the clerk of the superior court, as requested by the judgment creditor, issued an execution on the judgment, which was followed by Pratt's motion and an order denying the same.

[1] That appellant's discharge as a bankrupt released him from all liability upon the judgment must be conceded, unless the indebtedness falls within the exception specified in subdivision 2 of section 17 of the Federal Bankruptcy Act, [U. S. Comp. Stats. (1916), sec. 9601, 1 Fed. Stats. Ann., 2d ed., pp. 708, 716], which provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations." The question then presented for determination is, Was the indebtedness upon which the judgment is founded a liability for property obtained by false pretenses or false representations? The judgment in the case of *Bowman v. Pratt* and his codefendant, Provident Realty Investment Company, was entered upon defendant filing his consent thereto; hence we must look solely to the complaint to ascertain the nature of the liability. As shown by the complaint, the material facts are as follows: In September, 1913, C. M. Wood, the City Builders Investment Company, a corporation, and the Big Five Corporation, a corporation, listed and placed certain real property for sale with one Charles P. Rogers. Thereafter defendants agreed with said Rogers, Wood, the two corporations named, and the Title

Guarantee and Trust Company, a corporation, to buy and handle said properties so listed with Rogers, upon certain specified terms, conditions, and prices for the sale and handling of same; it being agreed that the properties should, by the owners thereof, be conveyed to the Title Guarantee and Trust Company as trustee for certain beneficiaries, among whom was the defendant Pratt and the Provident Realty Investment Company. After the making of this agreement and the preparation of the trust agreements under which the property was to be conveyed to the Title Guarantee and Trust Company, and before the conveyance thereof, Pratt and his codefendant, the Provident Realty Investment Company, stated to Rogers that they would be unable to consummate the deal and carry out the terms of the agreement, unless they could secure the services of some party to co-operate with them in the handling thereof, and expressed their willingness, for a consideration of \$1,250, to execute a contract with such party, giving him an equal right to the participation with defendants in the profits to be derived from the handling of said properties, as set forth in said proposed declarations of trust. Rogers informed Bowman of the proposition so made; whereupon she proposed to advance and pay to said defendants \$1,250 for the right to an equal participation in the profits to be derived from the handling of said properties, provided Rogers would accept the position as selling agent to whom the defendants should delegate full authority to act in the matter. In furtherance of such agreement, Bowman instructed Thomas Ball, as her agent and attorney, to enter into a contract to that effect and pay defendant Pratt and his codefendant the sum of \$1,250 when said properties were conveyed to the Title Guarantee and Trust Company. Thereupon, in pursuance of instructions so given by Bowman to Ball, he, on October 14, 1913, in his own name, executed the contract with defendant Pratt and his codefendant and paid to them the sum of \$1,250. It is alleged in the complaint that, according to Bowman's instructions (which, in the absence of anything to the contrary, we assume to have been the instructions given Ball, her agent and attorney), the money was not to be paid to defendants until the conveyance was made to the Title Guarantee and Trust Company, "according to the true intent and purpose" of the declarations of trust. After the payment of this money, the City Builders Investment Company and the Big Five Cor-

poration refused to convey the property in accordance with their agreement so to do, and thereupon Bowman demanded the return of her \$1,250. Neither Wood nor either of the corporations ever conveyed the property to the Title Guarantee and Trust Company, nor was either of the declarations of trust ever executed. It is further alleged that the \$1,250 was paid to Pratt and his codefendant upon the sole consideration that said properties would be so conveyed, and by reason of the failure of the owners so to do the said Bowman received no consideration for the money so paid by her.

Subdivision 2 of section 17 of the act of 1903, in the plainest language, restricts the fraud which will prevent the release of a discharged bankrupt from provable debts to that of fraud by obtaining property by false pretenses or false representations. (*Zimmern v. Blount*, 238 Fed. 740, [151 C. C. A. 590].) There is absolutely nothing disclosed by the complaint from which the slightest inference in support of the contention that Pratt was guilty of obtaining the money of Bowman by means of false pretenses or false representations, can be drawn. On the contrary, it appears therefrom that the agreement was made between Pratt and Ball, each acting in good faith and, so far as shown, the former having no knowledge that Ball, with whom he contracted as a principal, was the agent of Bowman. Looking solely to the complaint upon which the judgment by consent was rendered, we find no allegation of fraud or deceit of any nature practiced by defendant upon plaintiff; indeed, stripped of immaterial and redundant matter, it appears that Ball, acting for an undisclosed principal and with full knowledge of the nature of the proposed and uncompleted speculative venture, paid Pratt \$1,250 for a one-half interest therein, which, due to no fault of Pratt, was not consummated, owing to which fact it might be said there was a failure of consideration.

The authorities cited by respondents not only involve the interpretation of prior statutes the provisions of which were broader and entirely different from that under consideration, but the facts made to appear in such cases clearly brought them within the provisions of such statutes.

The order is reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2861. Second Appellate District, Division Two.—February 27, 1919.]

D. FELSENTHAL, Appellant, v. M. D. WARRING et al.,
Respondents.

- [1] **EASEMENT—WATERS AND WATERCOURSES—RIGHT OF WAY FOR IRRIGATION DITCH—DESTRUCTION BY FLOOD—RECONSTRUCTION OVER NEW LINE—ERRONEOUS REFUSAL OF INJUNCTIVE RELIEF.**—After the washing out by flood of an open earthen ditch, by means of which the defendants in this action had acquired and had for many years enjoyed the right to conduct water over plaintiff's lands along a definite and well-established line from a point of diversion from a creek on plaintiff's land to lands of defendants below, where defendants used the water for irrigation, the defendants had no right to reconstruct and maintain a ditch of a different character on plaintiff's lands, along a line distant from twenty-five to forty feet from the former line, and the trial court after the reconstruction of the ditch by the defendants on the line last described, erred in refusing the plaintiff an injunction to restrain its maintenance, and in adjudging that defendants had an easement in plaintiff's land for the construction and maintenance of the new ditch line.
- [2] **ID.—NATURE OF EASEMENT.**—The defendants' right of way having been acquired either by prescription or while the plaintiff's land was still a part of the public unoccupied lands of the United States, the defendants' right in plaintiff's lands, whatever its source, was simply to continue the use thereof which they were enjoying at the time plaintiff acquired the land.
- [3] **ID.—LOCATION OF DITCH PRIOR TO FLOOD—RIGHTS ACQUIRED THEREBY.**—The right of way for the ditch having been definitely fixed by the acts of the parties prior to the flood which washed it out, the defendants had acquired the right to that particular location and no other.
- [4] **ID.—RECONSTRUCTION OF DITCH.**—On reconstructing the ditch after its destruction by flood, there was no principle of law that warranted the defendants subjecting to their use another and different portion of the plaintiff's land without his consent.
- [5] **ID.—CHANGING LOCATION OF DITCH.**—The location of an easement of this character cannot be changed by either party without the other's consent after it has been finally established, whether by express grant or by prescription.
- [6] **ID.—SLIGHT EXTENT OF CHANGE IMMATERIAL.**—The acquisition of a right of way over one portion of a person's land gives the grantee no right over any other portion, and it is immaterial that the new line

for an irrigation ditch constructed after the washing out of an old one was only from twenty-five to forty feet distant from the old line.

- [7] **ID.—CHANGE NOT WARRANTED BY SECTION 806 OF CIVIL CODE.**—Section 806 of the Civil Code, which provides that the “extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired,” does not warrant the contention of the defendants that because they had acquired a right to divert water from a creek at a point of diversion, on plaintiff’s land, they necessarily acquired as incident thereto a right of way for a ditch over the land, and that, therefore, if the way formerly used be destroyed by flood or other act of God, they may reconstruct the ditch along a new line, provided it be the one that will entail the least injury to the plaintiff’s land.
- [8] **ID.—CASE AT BAR—NATURE OF SERVITUDE.**—Where, as in the case at bar, the nature of the respondents’ enjoyment of the servitude prior to the washing out of the ditch consisted in conducting water in an open earthen ditch that followed a certain well-defined and established course over appellant’s land—a line that had been established for many years—that line and none other fixed the extent of the servitude that rested upon appellant’s realty.
- [9] **ID.—APPROPRIATION OF WATER.ON GOVERNMENT LANDS—NATURE OF RIGHT.**—The right of an appropriator of water on government land that has since become private property to divert the water at any particular place of diversion and conduct it to his own land over the land that has passed into private ownership is the right of the grantee of an easement, including such secondary easements as are necessary for the full enjoyment of the primary easement, such as the right to enter on the servient tenement to make necessary repairs, but not to increase the burden on the servient tenement by any alteration in the mode of enjoyment of the primary easement.
- [10] **ID.—SECONDARY EASEMENTS—CHANGING MODE OF ENJOYMENT.**—The right of secondary easement is not a right to change the mode of enjoyment, if such change increases the burden on the servient tenement, as by shifting the line of a ditch every time a flood or freshet washed away or ate into the bank of the stream.
- [11] **ID.—RIGHT TO APPROPRIATE WATERS—RIGHT TO CONSTRUCT DITCH DOES NOT FOLLOW.**—The right to appropriate waters does not carry with it the right to burden the lands of another with a ditch, although the proposed appropriation cannot be effected without the ditch.
- [12] **ID.—INJUNCTIVE RELIEF—MANDATORY INJUNCTION—GENERAL RULE.** It is a general rule, to which there are a few well-recognized exceptions, that when one, without right, attempts to appropriate the property of another by conduct which will ripen into an easement,

a court of equity will compel the trespasser to undo, so far as possible, what he has wrongfully done.

- [13] **ID.—EXCEPTIONS.**—A court of equity may decline to issue a mandatory injunction where the defendant is engaged in a business that serves the public, or where, by innocent mistake, erections have been placed a little upon plaintiff's land, and the damage caused to defendant by their removal would be greatly disproportionate to the injury of which the plaintiff complains.
- [14] **ID.—SUBSTANTIAL INJURY TO JUSTIFY INJUNCTION.**—To justify an injunction, there must be substantial injury, which, however, does not necessarily involve substantial damage.
- [15] **ID.—INJUNCTION—COMPARATIVE INJURY FROM GRANTING AND WITHHOLDING—BALANCING OF CONVENIENCES.**—The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in its incidents tortious; there can be no balancing of conveniences when such balancing involves the preservation of an established right, however small, which will be extinguished if relief be not granted against one who would destroy it.
- [16] **ID.—INJURY TO LAND—NUISANCE PER SE—INJUNCTION NOT DEPENDENT ON EXTENT OF PECUNIARY DAMAGE.**—In case of an injury to the land of another that is a nuisance *per se*, the right to an injunction does not depend upon the extent of the damage measured by a money standard, and the maxim, *De minimis*, etc., has no application.
- [17] **ID.—BALANCE OF CONVENIENCE—DOCTRINE INAPPLICABLE TO FINAL DECREES.**—The doctrine of "balance of convenience" though frequently determinative of the propriety of granting or refusing preliminary injunctions, has no application to final decrees on hearing on plenary proofs.
- [18] **ID.—JUDGMENT AND FINDINGS IN FAVOR OF DEFENDANTS ERRONEOUS.** In this action to enjoin the defendants from maintaining a reconstructed irrigation ditch on land of the plaintiff other than that over which the record shows they had acquired an easement, the judgment and findings that the defendants are the owners of an easement in that part of the plaintiff's land and enjoining the plaintiff from asserting any right adverse to that easement are alike erroneous.
- [19] **ID.—RIPARIAN OWNER—ERRONEOUS LIMITATION OF RIGHTS TO DIVERT WATER.**—The plaintiff in the present action being a riparian owner, the court erred in attempting by the decree to limit his right to divert the water to a fixed quantity, since as a riparian owner he had the right to have all the waters flow through his land in their accustomed way except as decreased by the reasonable use of other riparian proprietors or prior appropriators.

- [20] **ID.—APPROPRIATOR'S RIGHT TO WATER—DEFENDANTS' OWNERSHIP OF WATERS OF CREEK—FINDING UNSUPPORTED BY EVIDENCE.**—In such action a finding that the defendants owned the waters of the creek to the extent of sixty inches, that being the capacity of the defendants' ditch, was unsupported by evidence and erroneous, since the extent of an appropriator's or adverse user's right is limited not by the quantity of water actually diverted, nor by the capacity of his ditch, but by the quantity which is or may be applied by him to his beneficial uses, and there was direct evidence in the record that sixty inches greatly exceeded the amount necessary for the defendants' beneficial uses.
- [21] **ID.—AWARD OF CERTAIN NUMBER OF INCHES—MEANING.**—An award of sixty inches in a decree in such case means sixty inches "constant flow."
- [22] **APPEAL—CONFLICT OF EVIDENCE—FINDING BASED ON ERRONEOUS THEORY OF LAW.**—The rule that an appellate court will not reverse a finding if there is a substantial conflict of evidence does not extend to a case where it is clearly apparent that the finding is based on an erroneous theory of the law applicable to the evidence.

APPEAL from a judgment of the Superior Court of Ventura County. John M. York, Judge Presiding. **Reversed.**

The facts are stated in the opinion of the court.

Chas. F. Blackstock for Appellant.

Haas & Dunnigan and Robert M. Clarke for Respondents.

FINLAYSON, P. J.—The controversy which resulted in this action arose concerning the right to water flowing in Hopper Creek, in Ventura County, and the asserted right of defendants to reconstruct and maintain a ditch across plaintiff's land.

Plaintiff owns 137½ acres of land riparian to the creek. Of this tract about thirteen acres are suitable for cultivation. Defendants own lands in the same vicinity, only a small portion of which is riparian to the stream.

[1] In 1870, when plaintiff's land was still a part of the public domain, defendants constructed a dam in the creek at a place within what is now plaintiff's private property. At what time the land now owned by plaintiff ceased to be government land does not appear from the record. From an intake in the dam that defendants thus constructed on what is now plaintiff's property, they diverted water, through a ditch,

across the land that is now plaintiff's. A part of the ditch was in the bed of the creek and a part ran along and upon the westerly bank of the stream. The water thus diverted has ever since been used by defendants below the intake, on their lands, east and southeast of plaintiff's land. In 1878 the channel of Hopper Creek was changed somewhat by the floods of that year. Thereupon defendants constructed a new intake about 350 feet farther upstream, and, at the same time, constructed an additional 350 feet of ditch extending from this new intake to the head of the ditch of 1870. Until the flood of 1914 the ditch, though repaired from time to time, remained approximately as it was when the work of 1878 was completed. The capacity of the ditch is sixty miner's inches, continuous flow. It is made of earth, with an average width of two feet at the bottom and five feet at the top and an average depth of eighteen inches. From the foregoing it will be seen that, at the time when this action was brought, defendants had acquired an easement in plaintiff's land, giving them the right to maintain the ditch, as so constructed, as a conduit for the amount of water that they rightfully might divert from Hopper Creek at the intake on plaintiff's land, for use on their nonriparian lands under the flow of the ditch.

In 1914 a section of the ditch was washed away, as well as the bank along which that part of it had been constructed, making it necessary for defendants to rebuild. This flood of 1914 eroded the westerly bank of the stream so that now the bank is some feet farther west of where it previously had been. Shortly after the washout of 1914, but prior to the commencement of the action, defendants commenced the reconstruction of their ditch on plaintiff's land, and finished the work of reconstruction some time after the action was commenced. Three hundred and fifty feet of this reconstructed ditch defendants constructed along the bank of the creek at a distance of from twenty-five to forty feet west of the old ditch line. The action was commenced while defendants were rebuilding the ditch and before its final reconstruction. At the time of filing the complaint a temporary restraining order was issued. This order was dissolved shortly after the filing of defendants' answer. So that, before the entry of the final decree, defendants had completed the ditch along the new line, three hundred and fifty feet of which was, as we have stated, from twenty-five to forty feet west of where it formerly had been.

Plaintiff testified that, as located, the reconstructed ditch of 1914 would work less injury to his land than if located at any other place on his property, outside of the old location or in the creek bottom, where, he said, it would do him no injury whatever. There also is evidence to the effect that if the reconstructed ditch had been built in the creek bottom, defendants would have to construct it upon an artificial embankment which, in all probability, would be swept away by each recurring freshet. The narrow strip of plaintiff's land—about 350 feet in length and six or more feet in width—so appropriated by defendants in 1914 for their reconstructed ditch, is good sandy loam, suitable for cultivation, upon which corn was growing at the time when this part of the reconstructed ditch was built. Its value, however, does not exceed twelve dollars, and the injury to plaintiff's freehold caused by defendants' appropriation of his land for the reconstructed ditch of 1914 will not exceed twelve dollars. It is no doubt true that, as claimed by defendants, they will sustain considerable loss if they are not permitted to divert from the creek and convey to their orchards, through a ditch on plaintiff's land, the water heretofore so diverted and conveyed by them—a loss much in excess of the twelve dollars damage to plaintiff's land by reason of the change in the line of the ditch.

The complaint sets forth two causes of action. In the first, plaintiff seeks a preventive injunction, enjoining defendants from completing the reconstruction of the ditch along the new line—twenty-five to forty feet west of the old line—and a mandatory injunction requiring defendants to place plaintiff's land in the same condition as before the excavation of the new ditch, which, as we have seen, had been partially reconstructed when the action was commenced. In his second count, plaintiff seeks to quiet his title to the waters of the creek. The court denied plaintiff any injunctive relief whatever; instead, it entered a decree adjudging defendants to be the owners of an easement over plaintiff's land for the construction, maintenance, repair, and reconstruction of a ditch “substantially along the line of the present existing ditch”—that is, along the line of the ditch as reconstructed in 1914, twenty-five to forty feet west of the former ditch line. The court likewise enjoined plaintiff from asserting any right or title adverse to such easement and from interfering with the ditch. The decree declares that plaintiff is the owner of two and three-fifths

inches of water in the creek, for irrigation and domestic purposes; that defendants are the owners of all the water of the creek flowing down to their intake on plaintiff's land, up to sixty inches, excepting the two and three-fifths inches adjudged to belong to the plaintiff; that plaintiff be enjoined from taking more than two and three-fifths inches at any time when the amount flowing to defendants' ditch shall not exceed sixty inches. From the judgment and an order denying his motion for new trial plaintiff appeals.

1. The court erred in denying appellant any injunctive relief and adjudging that respondents have an easement in appellant's land for the construction, operation, and maintenance of a ditch along the new ditch line. Respondents' right to maintain a ditch on appellant's land was the right to continue the ditch that they were enjoying immediately before the flood of 1914. At that time they owned a certain right of way for a ditch of a certain character, acquired either by prescription or while the land was still a part of the public unoccupied lands of the United States. [2] The right of respondents in regard to appellant's land, whatever its source, was simply to continue the use thereof which they were enjoying at the time he acquired the land. Prior to the wash-out of 1914 the right of way had been definitely fixed and located along a certain definite and well-defined line. [3] The previous location of the right of way for the ditch had been as definitely and finally fixed by the acts of respondents as it would have been had the metes and bounds been set forth in an instrument of grant. They had acquired the right to that particular location and no other. The remainder of appellant's land was his, free from any right of respondents. After the flood of 1914, when they reconstructed their ditch, respondents appropriated for their use different land of appellant. [4] We know of no principle of law that warrants respondents in subjecting to their use another and different portion of appellant's land without his consent. [5] It is elementary that the location of an easement of this character cannot be changed by either party without the other's consent, after it has been finally established—whether it has been established by the express terms of a grant or by conduct that gives rise to a prescriptive title. [6] The acquisition of a right of way over one portion of a person's land, whether by grant or prescription, gives the grantee no right over any other por-

tion. It is entirely immaterial that the new line was only from twenty-five to forty feet distant from the old line. It was upon the property of appellant, over which respondents had no right whatever, and the principle is the same as if the new line had been hundreds of feet away from the old one. (*Vestal v. Young*, 147 Cal. 715, [82 Pac. 381].)

Nothing in *Ware v. Walker*, 70 Cal. 591, [12 Pac. 475], is inimical to these views. There the bed of the stream, where used by the plaintiff, could not be beneficially used by the defendants and no land available for any useful purpose whatever was invaded—nothing of any value whatever was appropriated. Having used the bed or channel of the arroyo as a part of his conduit for the water that he was entitled to divert, just as he would use an artificial ditch for the same purpose, the plaintiff in that case had the same right to clean out, remove obstructions from and repair the part of his conduit that consisted of the channel bed that he would have had had the whole consisted of an artificial ditch. The stream had become obstructed by the deposits, from natural causes, of gravel in its bed, so as to prevent the flow of water to plaintiff's ditch; by digging a ditch through the sand bar that had formed in the channel of the arroyo, plaintiff did nothing more of injury to the defendant than if he had removed a number of fallen trees which might have been washed down by the floods of winter, and which had lain across the stream, obstructing the flow of the water and preventing it from entering plaintiff's ditch.

[7] Respondents assert that, because they have acquired the right to divert water from Hopper Creek at a point of diversion on appellant's land, they necessarily have acquired, as an incident to that right, a right of way for a ditch over the land; and that, therefore, if the way formerly used for the ditch be destroyed by flood, or other act of God, they may reconstruct the ditch along a new line, provided it be the one that will entail the least injury to appellant's land. To support this contention they cite section 806 of the Civil Code. By this section it is provided that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Whether respondents' title to a right of way for a ditch be regarded as one resting upon an express grant from the government under the act of July 26, 1866, [14 Stats. 251], or upon prescription—an im-

plied grant—the result is the same. If regarded as an express grant from the government, it was a grant that did not specifically bound or define the right of way. While the land was still a part of the public domain, the way became definitely fixed and located along a certain line by the conduct of the grantees, the respondents here (14 Cyc. 1161; *Winslow v. City of Vallejo*, 148 Cal. 723, [113 Am. St. Rep. 349, 7 Ann. Cas. 851, 5 L. R. A. (N. S.) 851, 84 Pac. 191]); and when appellant's land acquired the impress of private property, the terms of the grant could not be changed, without his consent, so as to change the character of the easement or materially increase the burden of the servient estate. (*McGuire v. Brown*, 106 Cal. 660, [30 L. R. A. 384, 39 Pac. 1060]). If respondents' title be regarded as resting upon prescription—an implied grant—then for the purpose of determining its terms we must look to the nature of the enjoyment by which it was acquired; for, as provided by the code section already quoted, the nature of that enjoyment measures the extent of the servitude. [8] The nature of respondents' enjoyment of the servitude consisted in conducting water in an open earthen ditch that followed a certain well-defined and established course over appellant's land—a line that had been established for many years. That line, therefore, and none other, fixed the extent of the servitude that rested upon appellant's realty. (*Allen v. San Jose L. & W. Co.*, 92 Cal. 138, [15 L. R. A. 93, 28 Pac. 215]; *Vestal v. Young*, *supra*.)

[9] The right of an appropriator of water upon government land that has since become private property to divert the water at any particular place of diversion, and conduct it to his own land over the land that has passed into private ownership, is the right of a grantee of an easement. As a primary easement it, of course, includes what are sometimes called "secondary easements," or the right to do such things as are necessary for the full enjoyment of the easement itself, as, for example, the right to enter upon the servient tenement and make necessary repairs. But secondary easements do not give the owner of the primary easement the right to increase the burden upon the servient tenement. "The burden of the dominant tenement cannot be enlarged to the manifest injury of the servient estate by an alteration in the mode of enjoying the former." (*North Fork W. Co. v. Edwards*, 121 Cal. 666, [54 Pac. 69]. The italics are ours.) [10] The right of

secondary easements is not a right to change the mode of enjoyment, if such change increases the burden upon the servient estate—as would be the case if respondents shifted the line of their ditch every time a winter flood or spring freshet washed away or ate into the bank of the stream. (*North Fork W. Co. v. Edwards, supra*; *Joseph v. Ager*, 108 Cal. 517, [41 Pac. 422]; *Oliver v. Agasse*, 132 Cal. 297, [64 Pac. 401]; *Snyder v. Colorado etc. Co.*, 181 Fed. 62, [104 C. C. A. 136].)

[11] “The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the land owner, or a lawful exercise of the power of eminent domain; *and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch.*” (*Snyder v. Colorado etc. Co., supra*. The italics are ours.)

[12] Finally, it is contended that appellant is not entitled to any injunctive relief because an injunction is a matter, not of right, but of grace; and that greater injury will result in awarding than in withholding the injunction. The general principle that, when one without right attempts to appropriate the property of another by conduct which will ripen into an easement, a court of equity will compel the trespasser to undo, so far as possible, what he has wrongfully done, is too well established for discussion. [13] To this general rule there are a few well-recognized exceptions. Thus, it has been held that a court of equity may decline to issue a *mandatory* injunction where the defendant is engaged in a business that serves the public; or where, by innocent mistake, erections have been placed a little upon the plaintiff's land and the damage caused to defendant by their removal would be greatly disproportionate to the injury of which the plaintiff complains, and the defendant has proceeded with the erection while laboring under an innocent mistake of fact or a *bona fide* claim of right, and the plaintiff has been guilty of laches. (5 Pomeroy's *Equitable Remedies*, sec. 508; *Szathmary v. Boston etc. Ry. Co.*, 214 Mass. 42, [100 N. E. 1107].) Respondents' contention is that their case presents features that bring it within these exceptions to the general rule. But the appellant here was not guilty of laches, and respondents did not complete the reconstructed ditch in good faith. A large

part of it was completed by them in the face of appellant's objection after the action was commenced and a restraining order issued—the order that subsequently was dissolved.

[14] To justify the issuance of an injunction there must be substantial *injury*. Substantial "injury," however, does not necessarily involve substantial "damage." Where a valuable property right exists—no matter how small its value may be—and that right is substantially and materially interfered with by a nuisance caused by the wrongful use of the property by another, if the injury is of a continuing nature, requiring a multiplicity of suits to secure its redress, the injured owner of the right, if he be not himself at fault through laches or otherwise, is entitled to injunctive relief, not as a matter of discretion on the part of the court, but as a matter of right; and his right to this relief is not affected by any comparison of his loss with that resulting to the defendant by reason of the granting of the relief. [15] The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can be heard to say that he is injured by being prevented from doing to the hurt of another that which he has no right to do. When a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiæ*, and needs not to be implored *ex gratia*. There can be no balancing of conveniences when such balancing involves the preservation of an established right which will be extinguished if relief be not granted against one who would destroy it—yea, though the right be but that of a peasant to but a part of his small tenement. (*Walters v. McElroy*, 151 Pa. 549, [25 Atl. 125]; *Evans v. Fertilizing Co.*, 160 Pa. 209, [28 Atl. 702]; *Sullivan v. Jones & L. Steel Co.*, 208 Pa. 540, [66 L. R. A. 712, 57 Atl. 1065]; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538; *Bristol v. Palmer*, 83 Vt. 54, [31 L. R. A. (N. S.) 887, and extended note, 74 Atl. 331]; *Woodruff v. North Bloomfield Gravel Min. Co.*, 9 Sawy. 542, [18 Fed. 753]; *Weimer v. Lowery*, 11 Cal. 104; *Gregory v. Nelson*, 41 Cal. 278; *Learned v. Castle*, 78 Cal. 454, [21 Pac. 11]; *Moore v. Clear Lake W. Works*, 68 Cal. 146, [8 Pac. 816]; *Heilbron v. Canal Co.*, 75

Cal. 426, [7 Am. St. Rep. 183, 17 Pac. 535] ; *Allen v. San Jose L. & W. Co.*, *supra*; *Allen v. Stowell*, 145 Cal. 666, [104 Am. St. Rep. 80, 68 L. R. A. 223, 79 Pac. 371] ; *Vestal v. Young*, *supra*.)

[16] The obvious distinction between *injury* and *damage*—a distinction not always observed when dealing with the question before us—is emphasized by Mr. Wood, who, speaking of a man's right of dominion over his property and the jealous care with which the courts have ever guarded this sacred right, says: "Whatever invades this right is a *legal* injury, whether damages ensue or not." (Wood on Nuisances, sec. 783. See, also, secs. 376, 782.) As is said in *Learned v. Castle*, *supra*, speaking of an injury to another's land that is a nuisance *per se*: "It is an injury to the *right*, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. . . . The right to an injunction, therefore, in such a case does not depend upon the extent of the damage measured by a money standard—the maxim, *De minimis*, etc., does not apply." Though dissenting from the majority decision in *Sullivan v. Jones & L. Steel Co.*, *supra*, Justice Mitchell was constrained to say that "where a clear legal right is being infringed, I agree that the remedy in equity is as mandatory as in law."

Respondents have cited a number of cases where equitable relief was refused on the ground that the injury was merely theoretical and the damage small. In so far as these were cases where injunctive relief was refused, it will be found on examination either that the injunction that was refused was an injunction *pendente lite*—as was the case in *McGregor v. Silver King Min. Co.*, 14 Utah, 47, [60 Am. St. Rep. 883, 45 Pac. 1091]—or that the injunction was refused because there was no injury, the land having no value whatever—as was the case in *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444, [70 Am. St. Rep. 810, 54 Pac. 244], a decision by a divided court. [17] That the doctrine of the balance of convenience, so frequently determinative of the propriety of granting or denying a *preliminary* injunction, has no application to final decrees after hearing on plenary proofs, is

firmly established in this and other states. (*Richards v. Dower*, 64 Cal. 62, [28 Pac. 113]; note to *Bristol v. Palmer*, *supra*, 31 L. R. A. (N. S.) 882.) That an injunction may be refused where the property invaded is absolutely valueless is conceded. In such case there can be no real injury whatever. If the invaded property has no value, then, obviously, there can be nothing more than a mere theoretical injury, as was the case in *Jacob v. Day*, 111 Cal. 571, [44 Pac. 243]—one of the cases cited by respondents. Here appellant's property, wrongfully invaded by respondents, has some value, even though small, and his claim to damages at law is indisputable, even though, measured in dollars, the amount appears insignificant compared with respondents' investment. We know of no principle of law or power in a court of equity to justify or authorize an invasion of the property rights of one private party to serve the convenience or necessities of another private party. Such a principle, if once adopted by judicial tribunals, upon grounds of necessity, would, in its practical operation, result in a system of judicial condemnation of the property of one citizen to answer an assumed necessity or convenience of another citizen, and the sacred right of private property, so jealously guarded by courts in all English-speaking countries, would become but a shadowy unsubstantiality.

[18] If it was error to deny appellant a final decree granting him injunctive relief, what shall be said of a judgment that actually adjudges respondents to be the owners of an easement in that part of appellant's land upon which, as trespassers, they have wrongfully built a portion of their reconstructed ditch? Not only does the decree do this—it goes to the length of enjoining appellant from even asserting any right adverse to such easement. This is tantamount to an injunction enjoining appellant from ever bringing an action at law for the trespass, or from suing to recover the damage, however small, caused to his land by respondents' unauthorized invasion of his property. Such a judgment is clearly erroneous. The same error likewise inheres in and vitiates the findings. For this reason a new trial is unavoidable.

[19] 2. Appellant complains of that part of the decree which adjudges respondents to be the owners of all the surface waters of the creek up to sixty inches—the capacity of

their ditch—and himself the owner of but two and three-fifths inches.

Adopting the testimony of those witnesses who testified that the duty of water on lands such as appellant's is one inch to five acres, and finding that appellant owns thirteen acres of arable riparian land, the court found and adjudged him to be entitled to use thereon two and three-fifths inches for irrigation and domestic purposes. In so finding and adjudging the court seems to have ignored entirely appellant's indubitable right, as a riparian proprietor, to have the stream flow through his land undeteriorated in quality and undiminished in quantity, save as respondents, as appropriators or adverse users, have acquired a superior right to take a definite quantity of water from the stream before it passes from appellant's land.

Since appellant is a riparian owner, the decree should not have attempted to limit his water right to the right to divert a fixed quantity—two and three-fifths inches—for irrigation and domestic uses. The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right—a right, among others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. Use does not create the right; disuse cannot destroy or suspend it. If his needs do not prompt him to make any use of the waters, he still has the right to have them flow on to, and along, and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of other riparian proprietors or prior appropriators, if any there be. (*Hargrave v. Cook*, 108 Cal. 72, [30 L. R. A. 390, 41 Pac. 18].) The vice of the decree is that it limits appellant's right to such an amount as he may use for irrigation and domestic purposes upon his thirteen acres of arable riparian lands. He owned 137½ acres, all of which was riparian to the stream and included the thirteen acres of irrigable arable land. As between himself and respondents, appellant's right to the waters of the stream has no limitation, save as it is limited by the superior right of respondents as the owners of an appropriator's or adverse user's right. So limited, appellant's right to take water from the stream—as against respondents'—might be more or less than

two and three-fifths inches. Instead of fixing a definite quantity that appellant may take from the stream, and decreeing that his interest in the stream is confined to the right to divert such fixed quantity for irrigation and domestic uses, the court should have determined the amount that respondents are entitled to divert, and should have decreed that appellant has all the rights of a riparian proprietor, limited only by respondents' superior right to take from the stream a quantity ascertained and fixed by the court. True, the court did undertake to fix the quantity that respondents have the right to take from the stream, but in so doing proceeded upon an erroneous theory; and the finding that respondents are the owners of the waters of Hopper Creek to the extent of sixty inches is not supported by the evidence.

[20] Respondents contend that, because the evidence showed the capacity of their ditch to be sixty inches, the court was justified in inferring that sixty inches was the amount reasonably necessary for the beneficial uses to which they applied the water. That, in fixing the extent of respondents' right, the court proceeded upon the theory that the capacity of respondents' ditch measures their right to the water of the stream, regardless of whether that amount be greater or less than the amount reasonably necessary for their beneficial uses, is clearly apparent from a consideration of the whole record. In adopting the theory that the capacity of their ditch measures respondents' right to the water of the stream, the court indubitably erred. The extent of an appropriator's or adverse user's right is limited, not by the quantity of water actually diverted, nor by the capacity of his ditch, but by the quantity which is, or may be, applied by him to his beneficial uses. (*Barrows v. Fox*, 98 Cal. 63, [32 Pac. 811]; *Smith v. Hawkins*, 120 Cal. 86, [52 Pac. 139].) An appropriator's right is limited to such quantity, not exceeding the capacity of his ditch, as he may put to a useful purpose upon his land within a reasonable time, by use of reasonable diligence. (*Senior v. Anderson*, 115 Cal. 496, [47 Pac. 454].) A diversion over and above what is reasonably necessary for the uses to which he devotes the water cannot be regarded as a diversion for a beneficial use. He cannot waste. If there is any surplus over and above the water reasonably necessary for his beneficial use, the riparian proprietor below his point of diversion has the

right to demand that it flow in the stream as it has been accustomed to flow.

[21] Respondents' suggestion that, because the evidence shows the capacity of their ditch to be sixty inches, and that they always used the ditch capacity, the court could infer therefrom that sixty inches is reasonably necessary for their beneficial uses, does not impress us as having any force in the face of certain indisputable facts. It may be that, in the absence of any direct evidence to the contrary, a court would be justified in presuming that an appropriator takes no more than his reasonable uses necessitate. But here we have direct evidence, furnished by respondents themselves, that sixty inches greatly exceeds the amount reasonably necessary for their beneficial uses. Thus, Walter Warring, one of the respondents, testified that thirty inches, constant flow, would be sufficient to irrigate respondents' lands together with a piece belonging to one Pedleford. Respondents endeavor to make a point of the fact that this witness used the expression "constant flow," when saying thirty inches would suffice. But the sixty inches awarded to respondents by the decree means sixty inches "constant flow," or else the decree is fatally uncertain.

As indicating that the court seems to have tried the case upon the theory that the capacity of the ditch measures respondents' right, regardless of whether it carried more than was reasonably necessary for their beneficial uses, are the following facts, shown by the record: In the early stages of the trial, in reply to a statement by the court, counsel for respondents said: "We claim we are not confined to the necessity"—that is, the amount necessary for respondents' beneficial uses—"we claim we have a right to use as much as we have been using"; and when, later on in the trial, counsel for respondents asked one of their witnesses how much water, during the irrigation season, respondents took out of the stream, and counsel for appellant objected on the ground that counsel should ask, "How much was reasonably necessary for them to take?" the court instead of sustaining, overruled the objection. It was a proper objection, and should have been sustained. This ruling of the court, coupled with its failure to limit the quantity decreed to respondents to the amount which they themselves testified would suffice for their reasonable needs, convinces us that the court adopted respondents' theory that the capacity of their ditch measured the quantity of water

they were entitled to take, without regard to any waste on their part.

[22] We are fully aware that an appellate court will not reverse a finding if there is a substantial conflict in the evidence; but the evidence, in order to raise a conflict, must be such as to present a fair and reasonable ground for a difference of opinion. And where, as here, it is clearly apparent that the court's finding that respondents are entitled to sixty inches of water is based upon the erroneous theory that the extent of their right is measured by the capacity of their ditch, and that amount of water has been decreed to them in spite of the testimony of one of themselves that less than half of that quantity would suffice for the reasonable needs of their lands, we have no hesitancy in holding that the finding is within the rule declared in *Field v. Shorb*, 99 Cal. 661, [34 Pac. 504], *Smith v. Belshaw*, 89 Cal. 427, [26 Pac. 834], and *In re Coburn*, 11 Cal. App. 604, [105 Pac. 924].

The attempted appeal from the order denying appellant's motion for a new trial was taken after section 963 of the Code of Civil Procedure was amended in 1915, [Stats. 1915, p. 209]. The appeal from that order, therefore, is dismissed.

The judgment is reversed.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 1931. Third Appellate District.—February 27, 1919.]

S. J. IRWIN, etc., Appellant, v. JOHN SILVA et al., Defendants; JOHN EMRICK, Respondent.

- [1] **MECHANIC'S LIEN—TIME FOR FILING CLAIM—CONSTRUCTION OF SECTION 1187. CODE OF CIVIL PROCEDURE.**—Under section 1187 of the Code of Civil Procedure, where work is done under contract between the owner of the property upon which an improvement is made and the contractor, persons furnishing either labor or material may, at their option, file their claims of lien, either within thirty days after ceasing to labor or to furnish materials, or within thirty days after the completion of the original contract between owner and contractor; but where the work is not done under such a contract, laborers and materialmen must file their liens within thirty days after they have ceased to labor or to furnish materials.

[2] **ID.—IMPROVEMENTS MADE BY OWNER HIMSELF—ESTOPPEL NOT APPLICABLE.**—Where the improvements are not made under contract, but by the owner himself, either actually or constructively, the provisions of section 1187 of the Code of Civil Procedure, as to the filing of notice of completion, do not apply, and the estoppel raised by the latter part of that section, where there is a default on the part of the owner to file such notice, cannot be invoked by a laborer or a materialman.

APPEAL from a judgment of the Superior Court of San Joaquin County. M. D. Young, Judge. Affirmed.

The facts are stated in the opinion of the court.

Gordan A. Stewart for Appellant.

Webster, Webster & Blewett for Respondent.

HART, J.—The action was brought to foreclose a mechanic's lien on certain property belonging to the defendant, John Emrick. The land was under lease to defendant, John Silva, who obtained from plaintiff lumber and material which he used in constructing certain buildings for his own use. Defendant Silva defaulted, judgment was in favor of defendant Emrick, and the appeal is by plaintiff, on the judgment-roll, from said judgment.

It was found by the court: That between the fifth day of June, 1915, and the sixteenth day of November, 1915, plaintiff sold and delivered to defendant Silva lumber and materials which were used by him in the erection of certain buildings; that said buildings were constructed by defendant Silva with the knowledge of the defendant Emrick; that during the course of construction of said buildings and before they were completed portions of them were occupied by defendant Silva. "That the defendant, John Silva, continued to work intermittently in and about said buildings and improvements up to the fourth day of December, 1915, at which time said buildings were completed. That said buildings were constructed by said John Silva in person and not by a contractor. That on the eighth day of February, 1916, and within ninety days after the last delivery of said lumber and building material and the completion of said buildings," plaintiff filed a claim of lien. "That no notice was ever filed by the defendants, or either of them, . . . setting forth the date when said buildings were

completed, or any of the facts required to be set forth in section 1187 of the Code of Civil Procedure; . . . that the defendant, John Emrick, knew at all times that said buildings were in the course of construction, and he at no time gave notice that he would not be responsible for any bills incurred in the delivery of said lumber."

As conclusion of law the court declared: That \$540.45 was due plaintiff from defendant Silva, but "that, the plaintiff is not entitled to a decree against the defendant, John Emrick, establishing a lien upon the lands and premises of the said John Emrick in satisfaction of the judgment of the plaintiff against the defendant, John Silva . . . by reason that said claim of lien is null and void and of no force and effect, not having been filed within the time required by law."

The only question presented for our decision is, What time has a materialman in which to file a claim of lien for materials furnished and used in the construction of a building where it is not constructed under contract?

Section 1187 of the Code of Civil Procedure provides: "Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within thirty days after he has ceased to labor or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, if any, under which he was employed, must file for record . . . a claim of lien. . . . Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, . . . shall not be deemed such a lack of completion as to prevent the filing of any lien; and, in all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter: the occupation or use of a building . . . by the owner, or his representative; or the acceptance by said owner . . . of said building, . . . or cessation from labor for thirty days upon any contract or upon any building, . . . or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for. The owner may within ten days after completion of any contract, or within forty days after cessation from labor thereon, file for record . . . a notice setting forth the date when the same was completed, or on which cessation from labor occurred. . . . In case such notice

be not so filed then the said owner and all persons deraigning title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of lien must be filed within ninety days after the completion of any building . . . or the alteration, addition or repair thereto."

It will be observed that the lien was filed after sixty but within ninety days after the time at which the court finds that the buildings were completed. But the plaintiff relies upon and invokes the estoppel created by the latter part of section 1187, where there is default on the part of the owner of land upon which a building has been erected to file for record within the time prescribed by the section a notice setting forth the date when the same was completed, or on which cessation of labor occurred. On the other hand, the respondent contends, and upon that theory the court below decided the case, that the estoppel raised by said section has no application to a case where, as is the claim here, the building is not constructed or the improvement made under a contract. In other words, it is contended that the estoppel referred to is not available to the claimant where the building is constructed or the improvement is made by the owner of the land himself, either actually or constructively.

The position of counsel for the respondent, as above stated, follows from their construction of the following portion of said section, or from the signification they ascribe to the word "contract" as employed therein: "The owner may within ten days after completion of *any contract*," etc., implying, as is the theory, that the estoppel which follows from the failure of the owner to file the notice prescribed has relation to a contract, and that, unless, therefore, the work is done under a contract the estoppel cannot be made available as against the defense by the owner that the lien has not been filed within the time fixed by said section.

No case has been cited, and, after some independent research, we have found none, in which the precise question presented here has ever been considered and decided by any of the appellate courts of this state. We are, therefore, driven to a determination of the problem submitted entirely by what

we consider to be a reasonable construction of the language of section 1187 of the Code of Civil Procedure.

Counsel for the appellant, as in support of his contention as to the meaning and scope of that portion of said section which relates to the estoppel, lays particular stress upon the proposition that it is thereby provided that the estoppel shall apply to "*any* proceedings for the foreclosure of *any* lien provided for in this chapter." It is argued that this language clearly implies that the estoppel is applicable in any proceedings for the foreclosure of any lien authorized by any section or provision embraced within the chapter of the code relating to the liens of mechanics, laborers, materialmen, etc., and, therefore, may be invoked as well in a case where the work has not been done under a contract as in a case where the work has been done under a contract. But whether this argument be sound or not must be determined from an ascertainment of the meaning of the preceding language of the section. The language "shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter" obviously means, not necessarily all liens "provided for in this chapter," but any lien "provided for in this chapter" as to which it was the legislative intent that the estoppel might be invoked; so, after all, we are, as stated, required to turn to the language itself providing for the estoppel to ascertain in what cases the estoppel may be relied upon by a lien claimant. And in getting at the true meaning of the provision as to the estoppel—that is, to ascertain in what cases the legislature intended that the estoppel may be invoked—we will be greatly assisted by an examination of the preceding parts of said section and other provisions of the lien law.

[1] It is important to note the initial language of section 1187, viz.: "Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, within sixty days after he has ceased to labor, or has ceased to furnish materials, or both; or at his option, within thirty days after the completion of the original contract, *if any*, under which he was employed, must file for record," his lien, etc. It seems to us to be perfectly plain that that language was intended to mean that, in the case of any work being done under a contract between the owner of the property upon which the improvement is to be

made and a contractor, the persons furnishing either labor or materials in such case may, at their election, select one of two alternatives as to the time of filing their liens for the same, to wit, either within thirty days after they have ceased to labor or to furnish materials or within thirty days after the completion of the original contract between the owner and the contractor, but that where the work is not done by or under such a contract—as, for instance, where the work is done by the owner of the property himself, either actually or presumptively, laborers and materialmen must file their liens within thirty days after they have ceased to labor or ceased to furnish materials. That the second alternative or option was not intended to apply to the latter class, is, it seems to us, indubitably shown by the use of the words, “if any,” immediately preceding the words, “original contract.” The phrase, “if any,” as so employed, was certainly intended to and does operate as a limitation upon the second option—that is, the option to file the lien within thirty days after the completion of the original contract, if there be any such contract. If there be no contract, then the lien claimants furnishing labor or materials are afforded full opportunity to preserve their remedy by lien by filing the same within thirty days after they have ceased to labor or to furnish materials.

The theory upon which those bestowing labor upon or furnishing materials to be used in the construction of a building, where the work is done or to be done by contract between the owner and a contractor, are afforded by the statute two different occasions upon which they, at their option, may file their liens may thus be explained: In the case of work done by or under contract, the contractor himself employs the labor and orders the materials essential to the completion of his contract, and, it may be added, is primarily liable for the labor bestowed upon and the materials furnished for the construction or repair of the building or other structure. It is safe to say that in such a case the contractor is required, in many instances, to rely upon the money he is to receive as the contract price with which to pay for the labor and materials employed by him in the execution of the contract, and it follows that, in such circumstances, he must obtain credit to enable him to carry out the terms of his contract. The contract may provide for the payment of the contract price in installments, of which it may be agreed that some shall not be paid until the

contract has been fully completed, or substantially so. The legislature, having this situation in view, very properly and wisely, therefore, took the pains to provide for such a contingency by giving to laborers and materialmen, in the case of work done by contract, the option of filing their liens within the time specified as well after the completion of the contract as after the cessation of labor or of the furnishing of materials, thus enabling them to extend the credit to the contractor, if they wish to do so, and at the same time enabling the contractor to go on with the completion of his contract without that embarrassment or handicap which might follow as against him from the filing of liens before the completion of the work. In such case, the laborers and materialmen would not be required to exercise constant watchfulness to ascertain precisely when the time for filing their liens would begin to run, for then they would know from the contract itself, which should be on file in the county recorder's office, about when it would be completed, or may rely for knowledge of that fact upon the notice of completion which the owner is required to file, in the case of a statutory as well as in that of an actual completion (*Boscut v. Waldmann*, 31 Cal. App. 245, 254, 255, [160 Pac. 180]), to preserve in himself the right to object if the lien is not filed within the statutory time.

The situation is entirely different where the work is not done by contract. The owner in such case is primarily responsible for the claims of laborers and materialmen furnishing the labor and the materials to carry on the work. Then in that case there may be no definite plans or definite time fixed for the completion of the work, with the result that the work may be extended over a long period of time to comport with the convenience of the owner. The work may be, in point of magnitude, of little consequence, and material for its purpose may be ordered and delivered but not put into the building or structure for months after its delivery, and thus, claimants in such a case, if they were required to wait until the filing of a notice of completion by the owner, would have to wait an indefinite time before they could file their liens, without prematurely doing so. Such lien claimants can, themselves, it is obvious, always know, independently and without the aid of extrinsic evidence or notice, when they have ceased to labor or to furnish materials, and thus more than other persons are in a position to know the date from which the time

within which they must file their liens, if they would enjoy the benefit of such protection, begins to run. They are not required to be incessantly on the alert and so watch the progress of the work for the purpose of ascertaining when it is completed.

But it is hardly necessary to proceed further in the discovery of reasons which justify the conclusion that in but one contingency are the laborers and materialmen at liberty, under the statute, to file their liens after the completion of the work. It may be added, however, that the initial language of section 1187 clearly and unquestionably provides for two different courses which the owner of land is at liberty to adopt for the erection or improvement of structures thereon, to wit: 1. Where the work of construction or repair is done under a contract between the owner of the land upon which the improvement is to be made and a contractor, in which case either the original or subcontractor employs the labor and orders the materials; 2. Where the owner, either by himself directly or by agent, presumptively or constructively, does the work and employs the labor and orders the materials; and that from this proposition it becomes the more clearly apparent that wherever the term "contract" is employed in the statute, it was intended to be so used and to be understood in the sense in which it is employed in section 1183, the initial section of the chapter upon the subject of liens. And that the sense in which that word or the phrase, "original contract," is used in the latter section is that of work to be done by or under a contract between the owner and a contractor is plainly evidenced by the provision contained in said section 1183 to the effect that the liens "in this chapter provided" shall not in the case of any claimants, other than the *contractor*, be limited, as to any amount, by any *contract price agreed upon between the contractor and the owner, except,*" etc., the provision as to the effect of the filing of "such original contract" before the commencement of the work upon the rights of those performing labor thereon or furnishing materials thereunder, the provision for the filing of a bond with "such contract" in the office of the county recorder, the effect of which is, in addition to securing to lien claimants, other than the contractor, the payment of their liens, to restrict the right of recovery as against the owner to the "contract" price, and the provision that any change, alteration, or modification "of any such con-

tract between the owner and his contractor" shall not have the effect of releasing or exonerating any surety or sureties upon any bond given under this section. All these provisions, we say, unquestionably, refer and apply to cases where the work is done, not by the owner himself, either actually or constructively, but by or under contract between the owner and a contractor, and from this, as before declared, the proposition seems to be clearly deducible—indeed, so much so as to transfer it far beyond the realm of doubt—that wherever the word "contract" or the phrase "original contract" is thereafter used in the law, it must have been so employed in the sense in which section 1183 uses it, unless there is discernible from the statute itself some overruling reason for applying the term or the phrase in a different sense. No just reason has been shown and, after a painstaking consideration of the lien law in its entirety, none has occurred to us, supporting the contention of the appellant with respect to the sense in which the legislature intended the word, "contract" as used in that part of section 1187 relating to the filing of notice by the owner of the completion of the work was to be understood and applied. Indeed, the construction above given section 1183 and the initial language of section 1187, about the correctness of which construction it seems to us there can be no doubt, is itself sufficient to negative the contention that the word "contract" as used in the provision relating to the filing of notice of completion by the owner is to be interpreted to mean the "building" or the "structure" or the "work," whatever may be its character, to be done. As pointed out, there is apparent no good or any reason why that word should be given such a meaning. To require the owner, in cases where he has himself, either actually or by presumption, done the work, to file a notice of completion would add nothing to the rights of lien claimants in such cases, it would benefit them in no way, it would afford them no better or greater or more advantageous opportunity to preserve their right to liens than by the provision that they may file their liens within thirty days after they have ceased to labor or to furnish materials. Besides, as already shown, the exercise of the second option provided for in a case where the work is done by contract could not affect the owner where he does the work himself as it does a contractor in the former case, for, while the provision may, as shown, help the contractor in certain indicated circumstances, and at the same time

afford ample protection to claimants, yet where the work is done by the owner himself it can be of no just benefit to him, since he must himself pay for the labor and materials employed in the work, and may proceed with the work according to his own wish and convenience. He may, as before stated, extend the work of construction over a long period of time—in fact, indefinitely—or do it by piecemeal, if he is without the means to press it on to completion as early or soon as ordinarily he might, and yet in such case he cannot suffer by reason thereof as could a contractor, who is, ordinarily, bound to complete his contract within a specified or reasonable time.

But there is another and, we think, a well-nigh conclusive reply to the contention that the provision for the filing by the owner of a notice of the completion of the contract applies to the case where the work is not done under contract, and it is this: The provision with respect to the filing of a notice of completion as it read prior to the revision of the lien law by the legislature of 1911, [Stats. 1911, p. 1313], was in the following language: "The owner of any property on which labor has been bestowed or for which materials have been furnished to be used in the construction, alteration, addition to or repair, either in whole or in part, of any work mentioned in section 1183 of this code, must, within ten days after the completion thereof, or within forty days after the cessation from labor upon any unfinished contract, or upon any unfinished building, improvement or structure, or the alteration, addition to or repair thereof, file for record . . . a notice setting forth," etc. (See Stats. 1897, p. 202.) We have seen no cases which have construed the section as it thus read prior to 1911, but undoubtedly the language quoted could reasonably have been so construed as to have made it applicable to cases where the work was not done by contract as well as those cases where the work was done by contract, and it is most probably true that, when so applying it, it was found to be so unnecessary—so impotent in the achievement of any useful purpose—that the legislature of 1911, having so viewed it, *ex industria*, changed it so as that it would read as it now exists. At any rate, we can conceive of no stronger reason calling for the amendment than that of avoiding the absurdity of requiring the owner, where he has himself done the work, to file a notice of completion when at the same time there exists a provision which affords the laborer and materialman in such a case the

right of filing their liens within thirty days after they have ceased to labor or to furnish materials, an event produced by their own acts or conduct and which, therefore, they of necessity have actual knowledge of.

[2] It follows, of course, from the view of section 1187 above given, that only those whose rights would be affected by the filing of the notice of completion may invoke the estoppel provided for in said section when no such notice is filed. If, in other words, the provision as to the notice of completion applies only when there is a contract, then, obviously, the estoppel is applicable and may be invoked only when there is a contract. There being no contract in this case—that is, the buildings for which the plaintiff furnished materials not having been constructed by or under contract between the owner and a contractor but constructively by the owner himself—the provision of section 1187 as to the filing of notice of completion does not, as to the appellant, apply, and as an essential corollary of that proposition the estoppel provided for in said section does not apply and, therefore, cannot be invoked in this case. In a word, the plaintiff, by reason of the circumstances of this case, comes within that class of lien claimants who have available to them under the statute but a single course to pursue to preserve their remedy by lien, viz., to file their liens within thirty days after they have ceased to labor upon or furnish material for the work to be done.

The effect of the construction herein of the statute, as amended in 1911, is obviously not to impair in any way the rights of any claimants, but, on the contrary, it seems to us, is to make it fair and just to all lien claimants. And no discrimination can result from the statute as it is so construed. The statute deals with two general classes of cases, and as we construe it those of each class are treated alike. The contingency upon the happening of which a member of each class must act to preserve his rights is plainly pointed out and affords to every claimant full opportunity for protecting his rights under the statute. If our construction of section 1187 would lead to any other result, we would, of course, be compelled to hold, in the face of plain, ordinarily understandable words and language, that the legislature did not intend to say what the face of the language of the statute clearly and naturally implies and signifies. But, as we have shown, to give to all claimants their constitutional right to liens and at the same time give to own-

ers just protection, there is no necessity for such a construction of the law established for the enforcement of liens as it exists at the present time. As declared, the law, as we here construe it, in no way curtails or qualifies or impairs the rights of any of the claimants of either class, but leaves all with equal rights, according to the several contingencies upon which they may preserve their right of lien, and affords them as well as the owners of property ample protection.

Accordingly, we conclude that the decision below is correct, and the judgment is, therefore, affirmed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919.

All the Justices concurred except Melvin, J., who was absent.

[Civ. No. 2702. First Appellate District, Division Two.—February 28, 1919.]

LAIDA F. LEMLEY, as Administratrix, etc., Plaintiff and Respondent, v. DOAK GAS ENGINE COMPANY, Defendant and Appellant; PACIFIC FOUNDRY COMPANY, Defendant and Respondent.

- [1] EMPLOYER AND EMPLOYEE—DEATH OF EMPLOYEE—ACTION FOR DAMAGES—ROSEBERRY ACT—ELECTION TO ACCEPT PROVISIONS—CONSTRUCTION OF ACT.—In this action for damages for the death of an employee, who was employed at a daily wage by one who at the time of the employment was not subject to the provisions of the Roseberry Act (Stats. 1911, p. 796), but who elected to accept the provisions of the act seventeen days before the accident in which the employee was killed, it is held that the failure of the employee, when the employer accepted the provisions of the act, to give notice in writing that he, the employee, elected not to become subject to the act, did not render him subject to its compensation provisions, since subdivision 2 of section 7 of the Roseberry Act has reference to the time of the employee's entering into the "contract of hire" mentioned in that section, and not to any automatic renewal each day of the contract of hire by going to work each morning.

- [2] **ID.—EMPLOYEE'S TIME TO ELECT.**—The section of the Roseberry Act referred to plainly contemplated that an employee, under such circumstances as those in the present case, should have thirty days after the acceptance by the employer of the provisions of the act within which to elect whether he, the employee, would be bound by the act or not.
- [3] **ID.—EMPLOYEE'S FAILURE TO ELECT.**—Failure of the employee to elect not to be bound for seventeen days after the employer became subject to the act was not an acceptance of the provisions of the act on his part, since the employee had thirty days within which to make such election.
- [4] **EVIDENCE—EXPERT OPINION—ACTION FOR DAMAGES FOR DEATH—BURSTING OF FLY-WHEEL—CAUSE OF ACCIDENT.**—In an action for damages for a death due to the breaking of a fly-wheel while an engine was being tested, it was not improper to ask a witness who had assisted in making the tests and had testified fully regarding all the facts and circumstances surrounding the accident: "What, in your opinion, caused that fly-wheel to break?"

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge. Affirmed.

The facts are stated in the opinion of the court.

Stanley Moore and Geo. K. Ford for Plaintiff and Respondent.

Fitzgerald, Abbott & Beardsley and Chickering & Gregory for Defendant and Appellant.

Thomas, Beedy & Lanagan for Defendant and Respondent.

LANGDON, P. J.—This is an appeal from a judgment for seven thousand five hundred dollars in favor of the administratrix of the estate of Clyde V. Lemley, deceased, on account of the death of said deceased. There are two questions presented by the appeal. The first of these is: Was the deceased at the time of the accident which caused his death subject to the compensation provisions of the Roseberry Act?

The facts of the case, pertinent to this inquiry, are as follows: Lemley, the deceased, was employed by the foreman of the defendant, Doak Gas Engine Company, about the middle of January, 1913, as a machinist's helper. He continued to work daily at the plant of the defendant until March 8, 1913, the date on which he was killed. He had been hired at a daily

wage. At the time of his employment his employer, the defendant herein, was not subject to the provisions of the Roseberry Act. On February 19, 1913, which was seventeen days before the day on which Lemley was killed, the employer elected to accept the provisions of this act. The deceased had not given to the defendant any notice that he elected not to become subject to the compensation provisions of the act up to the time of his death. It is conceded that the accident which brought about the death of Lemley arose out of his employment and occurred while he was acting in the course of his employment. The solution of the first point raised by appellant depends upon the proper construction of section 7 of the Roseberry Act, [Stats. 1911, p. 796]. The significant portion of said section is as follows:

"Sec. 7. . . . Any employee as defined in subsection (2) of the preceding section shall be deemed to have accepted and shall, within the meaning of section 3 of this act be subject to the provisions of this act and of any act amendatory thereof, if, at the time of the accident upon which liability is claimed:

"(1) The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

"(2) At the time of entering into his contract of hire, express or implied, with such employer, such employee shall not have given to his employer notice in writing that he elects not to be subject to the provisions of this act, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of the act, such employee shall, without giving such notice, remain in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act."

[1] The appellant seeks to bring deceased under the compensation provisions of said act by the contention that the contract of hire under which he was working at the time of his death was entered into after February 19, 1913, the date when the defendant became subject to the act, and that, therefore, deceased's failure to give notice in writing that he elected not to be subject to the act should be deemed an acceptance thereof. In support of this position appellant argues that the original employment being at a daily wage was a contract from day to day under the presumption raised by section 2010 of the Civil Code, and ended at the close of the first day; and

that under section 2012 of the Civil Code, such express contract was replaced on each subsequent day that Lemley worked for the defendant by an implied contract of hire upon the terms of the original express contract. And this argument brings appellant to a position where it contends that the contract under which deceased was working at the time of his death was an implied contract entered into the day of the accident upon the same terms as the original express contract, and that the deceased was under the obligation of rejecting the compensation provisions of the act on the morning of the accident or of being bound thereby. Section 2012 of the Civil Code is as follows:

“Renewal of Hiring. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.”

We think that in this case since the employee actually made an express contract with his employer, the fact that under section 2012 he may have automatically renewed it each day upon the same terms as those of the original contract by going to work each morning, does not change the fact that the contract of employment was an express contract and was made about the middle of January, before the defendant was subject to the provisions of the act. Section 2012 merely provides for a renewal of the original contract. We think that the language of the Roseberry Act: “At the time of *entering* into his contract of hire, express or implied . . . ,” has reference to the original contract of hire and not to any automatic renewal thereof. Appellant argues that since the words “express or implied” are used, the legislature must have meant by the word “implied,” the implied contract raised by section 2012 of the Civil Code, because, appellant states: “It is hard for us to conceive of any transaction to which this term [implied] can be attributed unless it be such a contract as is implied in law by section 2010 and 2012 of the Civil Code.” It is not difficult for us to conceive of an implied contract which shall also be the original contract of hire. “A contract is implied to pay for services accepted by the defendant under such circumstances as to raise a presumption that he expected or ought to have expected that they were to be paid for.” (1 Parsons

on Contracts, p. 4; *Krieger v. Feeny*, 14 Cal. App. 538, [112 Pac. 901].)

[2] Section 7 of the act refers to the time of "entering" into the contract and not to the time of "renewing" it. We believe that the section of the act above quoted plainly contemplates that an employee, under such circumstances as those in the present case, shall have thirty days after the employer accepts the provisions of the act, within which to elect whether he (the employee) will be bound by the act or not. We are strengthened in this view by the fact, as pointed out by respondent in her brief, that the construction contended for by appellant would make it necessary for all employees whose compensation was fixed at a daily wage to file a notice with their employer each morning that they refused to accept the provisions of the act or else they would be bound thereby.

Appellant quotes from *Matter of Zany*, 20 Cal. App. 360, [129 Pac. 295], to the effect that a statute should be construed so as to avoid "absurd and unjust consequences," and we think that to so construe this statute as to place upon employees employed at a daily wage the duty of filing with their employer each morning a written notice that they refuse to be bound by the provisions of the act, would be to bring about a condition which would be both absurd and unjust. This clearly was not the intent of the legislature. The "contract of hire" mentioned in the section quoted, we think, means the contract of hire made at the time the employee began his employment. That contract may have been either express or implied.

[3] The act provides that where the contract of hire was made in advance of the employer becoming subject to the provisions of the act (as in this case), the employee shall become subject to the provisions of the act when he shall *remain in the service* of his employer without giving notice in writing that he elects not to be subject to the act for a period of *thirty days* after the employer has filed with said board an election to be subject to the act. In this case the employee remained in the employment only seventeen days after the employer became subject to the act, and therefore said employee did not become subject to the provisions of the act and the trial court properly so decided.

The second point raised by appellant is that the court erred in admitting the testimony of one Downie as to his opinion

of the cause of the accident, without any statement of the basis for such opinion, and that such error was prejudicial to the defendant.

The amended complaint set out three charges of negligence. First, that the deceased was not given a safe place to work; second, that the defendant knowingly directed the deceased to perform a particularly hazardous task without advising him of its dangerous nature; third, that the gas engine which was being tested by deceased at the time of the accident was being tested in a negligent manner in that no provision was made for the cooling of the fly-wheel after the same had been heated by friction and no protection was furnished to the employee against a possible breakage. The defendant company was engaged in the manufacture of internal combustion gas engines. On the day of the accident, certain engines were being tested as to horse-power, one of them being the engine which caused the accident. The manner of testing was as follows: "A two by four scantling about ten feet long was placed under the fly-wheel of the engine, and an employee was directed to exert an upward force on the end of the scantling, away from the engine. The scantling came in contact with the fly-wheel and necessarily retarded the same. Whether or not the requisite power was developed was determined by the amount of resistance the wheel could withstand. During a part of the day this engine was tested by a leather belt applied around the fly-wheel. The engine had been tested all day. The accident occurred late in the afternoon. The test was being performed by James E. Downie, a machinist employed by the defendant company. The fly-wheel had on several occasions during the day become heated. Lemley, the deceased, was a helper to Downie, the machinist, and was assisting in testing the engine. The deceased was instructed by Downie to hold the scantling against the fly-wheel of the engine while Downie went outside to inspect the exhaust pipe. While the deceased was applying this pressure the fly-wheel broke into many pieces, and a piece struck Lemley on the head, causing his death.

[4] The witness Downie was called for the plaintiff and after testifying fully regarding all the facts and circumstances surrounding the accident, he was asked the question: "Will you state to the jury what, in your opinion, caused that fly-wheel to break?" Defendant objected to this question as "incompetent, irrelevant, and immaterial and calling for the opin-

ion and conclusion of the witness on a matter not properly the subject of expert testimony, and upon the further ground that the proper foundation had not been laid, and it calls for an answer to the very question to be passed on by the jury." The court overruled the objection and the witness answered: "I think the heat done it. That is why I went up and felt the fly-wheel."

The ultimate questions to be passed upon by the jury were whether or not the engine was being negligently tested by the defendant company and whether or not the employer had furnished the employee with a safe place to work. However, even if the question of what caused the fly-wheel to break had been the question before the jury, we think there would have been no objection to receiving the opinion of the witness upon the subject for that reason. "It is sometimes said that an opinion is not to be offered on 'the very issue before the jury,' but this, as once remarked (*Snow v. Boston & Maine R. R. Co.*, 65 Me. 231), would rather 'seem to be a very good reason for its admission.' If the witness can add instruction over and above what the jury are able to obtain from the data before them, it is no objection that he refers to the precise matter in issue, and if his opinion is superfluous, it is inadmissible even if it concerns a matter not directly a part of the issue." (1 Greenleaf on Evidence, 16th ed., p. 551.)

No objection was made to the qualifications of the witness as an expert, and the appellant now urges that the facts upon which the opinion was based should have been stated to the jury so that the jury could judge as to the existence of such facts and be able to value the opinion accordingly, and that Downie in rendering his opinion really acted as one of the jury and usurped the functions of that body. The appellant quotes from several decisions in foreign jurisdictions to sustain his position. The precise question raised is carefully analyzed in volume 1 of Greenleaf on Evidence, sixteenth edition, at page 559. The statements there made seem to answer completely every argument of the appellant. It is pointed out that where a witness testifies by stating his inferences from facts *not personally observed by him*, it is necessary, for the sake of the jury in dealing with his testimony, that the data on which he bases his inference be specified by him and stated as assumed or hypothetical. It is also said that where the witness has personal observation of the facts upon which he

bases his opinion, these facts can be stated by him upon his direct examination or upon his cross-examination as the observed facts upon which he bases his opinion. But if he has not had any personal observation of the facts and forms his opinion merely upon testimony listened to or upon other intimations of the facts, it would be impossible for the jury, merely from his statement of opinion, to know what were the data for the opinion. It would therefore be necessary for him, in stating his opinion, not only to specify the data for it (if this were all, it might be done by a question on cross-examination), but to specify them hypothetically, i. e., as only assumed by him to exist. This is for the purpose of allowing the jury to reject the opinion as having no application to the facts of the case where the jury finds that the hypothetical facts upon which it is based do not exist. Thus, the necessity for stating the data hypothetically arises because the witness has no personal knowledge of them, and because it cannot be known, before the jury's retirement, what data they will find to be facts and therefore what opinions are applicable to the case as found by the jury.

The argument made by appellant that the witness in stating his opinion based upon facts which he had observed was "usurping the functions of the jury" is discussed by the author of the standard work on Evidence above mentioned. He points out that this objection, which has been frequently urged, has no foundation whatever, as the court does not empower the expert witness to decide any facts nor is the jury bound to accept his assertion.

The class of cases (from jurisdictions other than California) from which appellant quotes to support his contention is not overlooked by Mr. Greenleaf. In regard to them, we have the following language, which seems so peculiarly applicable to the present case, that we have thought it proper to quote it here: "As a matter of academic nicety, it might be thought to follow that even a witness speaking from personal observation might be required to specify the data for the opinion he founds on this observation; and to this extent a few rulings have gone. But in such a case the direct examination or the cross-examination sufficiently brings out the data that serve to found the opinion on; and it may be taken as a proper deduction of principle that the hypothetical statement of the data need not

be made except by witnesses not having personal observation of the data for their opinion."

The witness Downie had personally observed the facts connected with the operation of the engine on the day of the accident; he had been working upon it all day and up to a few moments of the accident; he had been making similar tests of engines for the defendant company for about a month before the accident. He had testified quite fully as to all facts connected with the operation and testing of the engine and both upon his direct examination and upon his cross-examination the facts appear upon which he must have based his opinion. If there are any which do not appear, the defendant might have brought them out upon cross-examination, and if it failed to do so, it may not complain.

In the case of *People v. Le Doux*, 155 Cal. 535, [102 Pac. 517], relied upon by appellant in its brief, the expert witness whose opinion was asked had made no personal observation of the facts. Necessarily, his opinion would have to be based upon hypothetical facts which should have been stated by him. In the case of *Eisenmayer v. Leonardt*, 148 Cal. 596, [84 Pac. 43] (the only other California case cited by appellant), the expert witness was asked his opinion of the value of certain stock, and the court held this to be error because, "there were no facts stated either real or hypothetical as a basis for an intelligent opinion." This statement is clearly not applicable to the case at bar.

We find no error in the record, and the judgment is therefore affirmed.

Brittain, J., and Haven, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision in the district court of appeal of the first appellate district, we deem it proper to say that the statement in the opinion of the district court of appeal to the effect that no objection was made to the qualifications of the witness Downie as an expert is, in our opinion, erroneous, as

the objection "that the proper foundation had not been laid" fairly presented the question of the sufficiency of the evidence as to the expert qualifications of the witness. However, we are of the opinion that there was sufficient evidence as to such qualifications, and in so far as this ground was concerned, the objection was properly overruled.

The application for hearing is denied.

All the Justices concurred

[Civ. No. 2719. First Appellate District, Division Two.—February 28, 1919.]

**LAURA G. POWELL, as Administratrix, etc., Appellant, v.
J. A. POWELL et al., Respondents.**

- [1] **APPEAL—QUESTION OF FACT—EVIDENCE—CREDIBILITY OF WITNESSES AND WEIGHT OF TESTIMONY.**—It is within the province of the trial court to determine the credibility of witnesses and the weight to be given to their testimony; it is the duty of an appellate court to harmonize apparent inconsistencies in the statements of the witnesses, and to do this it will indulge in every reasonable presumption of fact.
- [2] **ID.—INHERENT IMPROBABILITY—LACK OF SUBSTANTIAL EVIDENCE.**—To warrant an appellate court in determining there is no substantial evidence because of inherent improbability, there must exist either a physical impossibility of the evidence being true or a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story.
- [3] **TRUSTS—FINDING AGAINST TRUST SUPPORTED BY EVIDENCE.**—The evidence in this case is held sufficient to support findings and judgment that a transfer of stock was absolute and not charged with any trust.

APPEAL from a judgment of the Superior Court of Alameda County. W. M. Conley, Judge Presiding. **Affirmed.**

The facts are stated in the opinion of the court.

Howard Harron and Brewton A. Hayne for Appellant.

W. H. L. Hynes and Walter J. Burpee for Respondents.

BRITAIN, J.—The plaintiff appeals from a judgment, the effect of which was to determine that 249 shares of the capital stock of Powell Brothers Construction Company belonged to J. A. Powell and R. V. Powell, and that the estate of Charles G. Powell, deceased, had no interest in them as the beneficiary of any trust.

Charles G. Powell formed the corporation defendant and J. A. Powell and R. V. Powell owned equal interests in it. The other defendants held qualifying shares to enable them to act as directors. Charles G. Powell died in 1913. For ten years he suffered from an incurable disease. He retired from active business in 1912. Prior to his retirement he had done nothing for the corporation for some time. In November, 1912, he transferred to his brothers 249 shares of the stock, and they issued to him one share to qualify him as a director and to permit his name still to be used as president of the corporation. In January, 1913, he transferred this single share to them and resigned as president. The appellant claims the transfer of the 249 shares was without consideration and upon a trust for the benefit of Charles G. Powell. The lower court found Charles G. Powell had sold 248 of the 249 shares and all the credits he owned against the corporation for ten thousand dollars paid to him by J. A. Powell and R. V. Powell, and that he subsequently sold to them the remaining share for one hundred dollars. The court further found that each of the transfers was *bona fide*, that neither was upon any understanding that the buyers should retransfer, that the transfers were absolute and intended so to be, and that the holdings were not charged with any trust.

As a part of a very long finding condensed in the statement just made the following language relating to the payment of the ten thousand dollars was used: "All the money used for said payment came from the safe deposit box of R. V. Powell who had almost one thousand dollars remaining therein after withdrawing the said ten thousand dollars therefrom." The appellant attacks this finding of the probative fact, arguing that since the finding of the ultimate fact of purchase depends on the finding of payment of ten thousand dollars, and the fact of payment depends on the money coming from the safe deposit box, if it should be demonstrated there was not ten thousand dollars in the box, the entire structure must fall.

However compelling this logic may be, its entire force rests upon the demonstration that the money was not in the box.

On behalf of the appellant it is next asserted that if the testimony of any witness is inherently improbable, it may be disregarded. Subject to many limitations this doctrine of inherent improbability is established by ample authority, and its existence has many times been recognized in this state. The elaborate attempt on the part of the appellant to show that the rule should be applied in this case falls far short of the requirements of the rule itself. The presumptions that every witness speaks the truth and that the judge of the trial court faithfully performs his duty in determining the weight and credibility of evidence are not to be ignored because of argument based on deductions drawn from inferences superimposed upon assumptions unwarranted by any fact.

A single illustration serves to show the tenuous character of the deductions upon which reversal is asked in this case. The bill of exceptions shows that in the accumulations of money in the safe deposit box was five hundred dollars, that amount having been handed to R. V. Powell by his wife more than a year prior to the payment of the ten thousand dollars. Prior to her marriage Mrs. R. V. Powell was a nurse, and as such she had rendered services to Mrs. Bellina, a sister of Powell. There was delay in the payment for services and Mrs. Bellina and Mrs. Powell finally agreed upon the sum of five hundred dollars.

On cross-examination Mrs. Bellina testified that she had deposited something over three thousand five hundred dollars in a savings bank, and paid therefrom to Mrs. Powell "in twenty-dollar gold pieces the five hundred dollars which she gave her husband for his safe deposit box." Further cross-examination developed clearly that the witness remembered giving five hundred dollars to Mrs. Powell, but she had no recollection about going to the bank for it. On redirect examination she testified she was not sure of the source from which she got the money, and said she may have got it from money she received from the sale of her house.

The record of withdrawals from the bank was introduced and showed the particular five hundred dollars was not drawn from the bank. Mrs. Powell testified she received five hundred dollars from Mrs. Bellina, in five-dollar pieces, ten-dollar pieces, and twenty-dollar pieces, and gave the money to her

husband, who said he was going to put it in his safe deposit box.

From these facts it is first assumed that despite Mrs. Bellina's statement to the contrary the five hundred dollars could not have come from the sale of the house. It is next inferred that although both Mrs. Bellina and Mrs. Powell distinctly remembered the payment of five hundred dollars in gold coin, neither honestly could have been mistaken in regard to the denomination of any of the coin. Even though the payment of five hundred dollars might actually have been of \$480 in twenty-dollar pieces and the remainder in one ten and two five-dollar pieces, if this fact were not remembered by a witness more than a year after the payment, under the theory advanced here, a positive statement that five hundred dollars was paid would be unworthy of belief. It is next deduced that "these intestine conflicts . . . are fatal to R. V. Powell's acquiring five hundred dollars for the box from his sister through his wife." It is finally argued that since this five hundred dollars and other sums upon similar inferences eliminated did not go into the box, it is mathematically demonstrated that ten thousand dollars were not in the box at the time of the purchase.

Upon such a diaphanous demonstration, this court is asked to apply the rule of inherent improbability, not alone to the evidence regarding the payment of five hundred dollars, but to all the evidence of all the defendants' witnesses. Confining the result of such an application of the rule to the evidence regarding the payment of five hundred dollars, it would necessarily follow that the three witnesses should be branded as perjurers. If upon similar demonstrations the rule were applied, numerous other witnesses would be similarly marked.

[1] It is within the province of the trial court to determine the credibility of witnesses before it and the weight to be given to their evidence. Even though the appellate tribunal might have reached a different conclusion, not having the opportunity to hear and see the witnesses, it is not permitted to substitute its own views for the conclusions of the judge who presided at the trial. If the record in any case shows there was no substantial evidence to support the finding of the lower court, the appellate court may, and it ought to, set it aside. [2] To warrant it in determining there is no substantial evidence because of inherent improbability, there must

exist either a physical impossibility of the evidence being true, or such a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story. The appellate court will not indulge in lengthy and dubious computations, nor seek far for a reason, no matter how ingenious may be the argument by which it is urged, to determine that witnesses have committed perjury. It is its duty, if possible, to harmonize apparent inconsistency in their statements, and to do this it will indulge in every reasonable presumption of fact.

[3] The entire record in the present case discloses ample evidence to support the particular finding of probative fact, as well as the findings of ultimate facts made by the judge who tried the case. The views of this court are in accord with those findings.

The judgment is affirmed.

Langdon, P. J., and Haven, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919.

All the Justices concurred.

[Civ. No. 2687. Second Appellate District, Division One.—March 1, 1919.]

R. N. NASON & COMPANY (a Corporation), Appellant, v.
MARIA J. KENNEDY, Respondent.

[1] GUARANTY—CONSTRUCTION — UNCERTAINTY — CONTINUING OR SPECIFIC GUARANTY — EVIDENCE — RESORT TO SURROUNDING CIRCUMSTANCES.—In this action on a guaranty, where there was uncertainty as to whether the parties intended the instrument to be a continuing guaranty, limited in amount, or a guaranty of one particular transaction, the court had to resort to the circumstances under which the instrument was executed.

[2] ID.—APPLICATION OF PAYMENTS.—Where a merchant sells goods to a customer under a guaranty, and afterward sells him other goods,

the first money received should be applied on the sales covered by the guaranty.

[3] **ID.—PRESUMPTION AGAINST CONTINUING GUARANTY.**—In every doubtful case the presumption ought to be against holding a guaranty to be continuing.

[4] **ID.—GUARANTY NOT CONTINUING—FINDING SUPPORTED BY EVIDENCE.** The evidence in this case supports the finding that the guaranty was not continuing, but was intended to cover the initial order of goods only.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. T. Craig, Bert P. Woodward and Henry N. Beatty for Appellant.

F. A. Stephenson for Respondent.

SHAW, J.—Plaintiff appeals from a judgment entered in favor of defendant in an action brought to recover upon a written guaranty executed by defendant, as follows:

“July 24, 1914.

“R. N. Nason & Co.,

“San Francisco, California.

“Gentlemen:

“I do hereby guarantee the account of L. C. Kennedy up to the sum of seven hundred fifty (\$750.00) dollars, for what goods in your line he may purchase from you, and it is understood that if he does not pay his bills under the terms of purchase that I will pay them or see that they are paid.

“Respectfully Yours,

“MRS. MARIA J. KENNEDY.”

Appellant contends that this instrument constituted a continuing guaranty, as defined by section 2814 of the Civil Code, whereas respondent insists that, as found by the court, it should be construed as a guaranty for goods bought to the extent only of \$750, which sum having been paid by L. C. Kennedy, the obligation of the guaranty was discharged.

[1] While by this writing defendant guarantees the account of L. C. Kennedy and agrees that if he does not pay his bills she will pay them, nevertheless it is silent as to what particular account or bill it had reference to. There is nothing

contained therein disclosing with certainty that the parties intended the guaranty should cover liability incurred in successive transactions covering an indefinite period of time. Hence, by reason of such uncertainty, we must, in determining the intention of the parties thereto, resort to the circumstances under which the instrument was executed. (*First Nat. Bank v. Bowers*, 141 Cal. 253, [74 Pac. 856].) These circumstances, as disclosed by the evidence, are as follows: In July, 1914, defendant's son, L. C. Kennedy, being desirous of engaging in the mercantile business, placed an initial order for a stock of goods with the Los Angeles agent of plaintiff, whose principal place of business was in San Francisco. Upon receiving this order plaintiff wrote to the agent from whom it had received the same, stating in substance that it could not make shipment of the goods unless payment thereof was guaranteed, and inclosed with its letter the form of guaranty, with the request that the agent get Kennedy to have his mother sign the same, and saying, "We understand she is responsible and thus we would be protected for this amount." Plaintiff further stated in the letter: "Mr. Kennedy should be willing to take this guaranty because on the terms you are desirous of making to him, he should be in a position to take care of his indebtedness easily, but as a precaution and as a safeguard and on account of the conditions under which he is going into business and also on account of the present financial situation, we must insist upon a guaranty." L. C. Kennedy, in substance, testified that plaintiff's agent, Mr. Hambly, who was instructed to secure the guaranty, in requesting same told him that plaintiff thought his order too large and had reduced it to approximately \$750, to the extent of which value they were willing to ship the goods in filling his order, if payment thereof was guaranteed by his mother; that there was no arrangement or understanding for the purchase of other goods from plaintiff than this initial order which the guaranty was intended to cover. Kennedy did from time to time, while conducting his business, buy other goods from plaintiff, the total amount of which was \$1,881.02, upon which he paid all but a balance of \$747.27, for which suit is brought. [2] "Where a merchant sells goods to a customer under a guaranty from a third person that they will be paid for, and afterward sells him other goods, the first money he receives from the purchaser

should be applied to the payment of the goods covered by the guaranty." (*Carson v. Reid*, 137 Cal. 253, [70 Pac. 89]; *Marx v. Schwartz*, 14 Or. 178, [12 Pac. 253].) [3] The former case is also authority for the statement, quoted from *Melville v. Hayden*, 3 Barn. & Ald. 593, that "it ought to appear *unequivocally* that it was the intention of the defendant to guaranty . . . payment for goods to be furnished from time to time"; and "that in every doubtful case the presumption ought to be against holding a guaranty to be continuing." Looking solely and alone to the guaranty, it cannot be said that it expresses an intention of the parties that it was to be a guaranty for a line of credit to the extent of \$750 to be extended by plaintiff to L. C. Kennedy and covering future transactions. Its language is equally susceptible of either interpretation, viz., that it is or is not continuing. Hence an ambiguity arises which may be explained by parol evidence of the situation and surroundings of the parties and the guaranty interpreted in the light of such circumstances. (*Bell v. Bruen*, 42 U. S. (1 How.) 185, [11 L. Ed. 89, see, also, *Rose's U. S. Notes*].)

[4] In view of the fact that L. C. Kennedy was for the first time applying to the plaintiff for the purchase of goods, which plaintiff refused to furnish except upon a guaranty of payment thereof, and there being no arrangement for a line of credit and no understanding that other purchases were to be made or contemplated, taken in connection with the statements made by plaintiff's agent, it may fairly be said that the parties understood and intended the guaranty to cover such initial order only. Had it been intended to cover future transactions, it should have been so worded as to include the same; but, as stated, it is silent as to the time, accounts, or bills which it was to cover.

The evidence supports the finding of the trial court that it was intended to cover the initial order of goods only, without which plaintiff was unwilling to furnish the same. The foregoing view renders it unnecessary to consider whether or not the evidence supported the finding of the court that there was no consideration for the guaranty.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 28, 1919.

All the Justices concurred.

[Civ. No. 1906. Third Appellate District.—March 4, 1919.]

COUNTY OF MERCED, Appellant, v. H. S. SHAFFER et al., Respondents.

- [1] **CRIMINAL LAW—BAIL BOND—ACTION TO REFORM AND ENFORCE.—PLEADING—INSUFFICIENT OBLIGATION.**—Sureties on a bail bond must bind themselves that they will do certain things or upon default that they will pay the state a specified sum; it is insufficient where they agree that their principals will pay.
- [2] **ID.—JOINT BOND—EXCESSIVE PENALTY.**—Where an order of court provided that two defendants in a criminal case be admitted to bail in the sum of five hundred dollars each, a bond purporting to be given on behalf of both defendants and providing that if the conditions are not performed the obligors will pay the people of the state the sum of one thousand dollars is insufficient, as it requires payment of one thousand dollars if either or both defendants fail to appear, whereas the order required a penalty of only five hundred dollars for each.
- [3] **ID.—STATUTORY BOND—COMMON-LAW OBLIGATION.**—A bond in a criminal proceeding is purely statutory; if it fails to conform to the statute and order of the court, it is not good as a common-law obligation.
- [4] **ID.—WHEN BOND VOID.**—A bail bond in excess of the order of the court is absolutely void.
- [5] **ID.—REFORMING VOID BOND.**—A bail bond void upon its face cannot be reformed, and the court below properly sustained a demurrer to the complaint.

APPEAL from a judgment of the Superior Court of Merced County. George E. Church, Judge Presiding. Affirmed.

C. H. McCray and Edward Bickmore for Appellant.

Hugh K. Landram, F. W. Henderson and C. W. Croop for Respondents.

BURNETT, J.—In the month of February, 1916, O. Dinelli and Francis Francisco were arrested upon a burglary charge

in Merced County. They were committed by the justice of the peace to the custody of the sheriff and their bail fixed at five hundred dollars each. After setting out these facts, the third amended complaint alleges further: "Said H. S. Shaffer and said J. J. Griffin and each of them for the purpose of releasing the said O. Dinelli and the said Francis Francisco from actual custody upon said charge, and in order that said O. Dinelli and the said Francis Francisco might be released therefrom, entered into and executed an obligation, bond, and undertaking"; that said bond was presented to the justice of the peace, who accepted and filed the same; "that a copy of said obligation, bond, and undertaking as the same was written when made, executed, and delivered to the people of the state of California by the said H. S. Shaffer and the said J. J. Griffin, as aforesaid, is hereunto attached and made a part hereof and marked Plaintiff's Exhibit 'A'"; "that after the said O. Dinelli and said Francis Francisco were taken into custody as aforesaid one L. J. Schino, an attorney of Merced, California, was employed by said defendants to represent them in the matter of said charge; that said justice of the peace did inform said L. J. Schino, as attorney for said O. Dinelli and Francis Francisco, of the order of admission of the said defendants to bail and the amount thereof, to wit, the sum of five hundred dollars for each defendant, and that said L. J. Schino did procure the execution of said obligation, bond, and undertaking of said H. S. Shaffer and J. J. Griffin and presented the said obligation, bond, and undertaking to said justice of the peace for his approval."

It is then alleged that through a mutual mistake of the parties executing, presenting, and accepting the bond, the obligation presented and accepted did not express the true intention of the parties, and that such intention was embodied in an instrument attached to the complaint, marked exhibit "B."

It further appears that upon the acceptance of said undertaking the defendants were released, and that thereafter they failed to appear for examination in accordance with the order of the court, and thereupon said undertaking was forfeited. The prayer of the complaint is that the undertaking executed by the defendants in this action be reformed, and as reformed the forfeiture of the same be enforced, and the plaintiff have judgment against defendants in the amount of the undertaking.

The bond as actually signed, executed, delivered, and accepted was in the following form:

Exhibit "A."

"In the Justice's Court of Number Two Township, County of Merced, State of California.

"The People of the State of California,	}
"Plaintiff,	
v.	
"O. Dinelli and Francis Francisco,	
"Defendants.	}

"Bail Bond.

"Whereas, an order having been made on the 24th day of February, A. D. 1916, by Frank H. Farrar, Esq., Justice of the Peace of No. 2 Township, County of Merced, State of California, in the above entitled cause, and the above named defendants, and each of them, be admitted to bail, pending the hearing upon the charge hereinafter mentioned, in the sum of One Thousand Dollars (\$1,000.00), that is to say, that each of said defendants be admitted to bail in the sum of Five Hundred Dollars (\$500.00) each, upon a charge of felony, to wit, burglary, alleged to have been committed in said county and state.

"Now, therefore, we, the undersigned, by occupation merchants, residents of the County of Merced, State of California, do hereby undertake, that the above named defendants, and each of them, shall and will appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and process of the court, or courts, wherein said charge is being or is to be prosecuted, and if convicted, shall and will appear for judgment and render himself in execution thereof; or if he, or they, fail to perform any of these conditions, that he, or they, will pay to the People of the State of California, the sum of One Thousand Dollars (\$1,000.00).

"_____. (Seal)

"H. S. SHAFFER. (Seal)

"J. J. GRIFFIN. (Seal)

"Approved this 25th day of Feb. 1916.

"FRANK H. FARRAR,

"Justice of the Peace."

Exhibit "B" is as follows:

"Bail Bond.

"In the Justice's Court of Number Two Township, County of Merced, State of California.

"The People of the State of California,
"Plaintiff,

v.

"O. Dinelli and Francis Francisco,
"Defendants."

"Whereas, an order having been made on the 24th day of February, A. D. 1916, by Frank H. Farrar, Esq., Justice of the Peace of No. 2 Township, County of Merced, State of California, in the above entitled cause, and the above named defendants, and each of them be admitted to bail, pending the hearing of the charge hereinafter mentioned, in the sum of one thousand dollars (\$1,000.00), that is to say, that each of said defendants be admitted to bail in the sum of five hundred dollars (\$500.00), each, upon a charge of felony, to wit, burglary, alleged to have been committed in said county and state.

"Now therefore, we, the undersigned, by occupation attorneys, residents of the county of Merced, State of California, do hereby undertake that the above named defendants, and each of them, shall and will appear and answer the charge above mentioned in whatever court it may be prosecuted, and shall at all times hold himself amenable to the orders and process of the court, or courts, wherein said charge is being or is to be prosecuted, and if convicted, shall and will appear for judgment and render himself in execution thereof; or if he or they fail to perform any of these conditions, that we, will pay to the People of the State of California, the sum of Five Hundred Dollars (\$500.00) for each of said defendants failing to perform any of these conditions.

"_____. (Seal)

"H. S. SHAFFER. (Seal)

"J. J. GRIFFIN. (Seal)

"Approved this 25th day of Feb., 1916.

"FRANK H. FARRAR,

"Justice of the Peace."

[1] It is apparent that there are two vital defects in the bond as executed. One of these is the same as appeared in the bond in the case of *County of San Luis Obispo v. Ryal et al.*, 175 Cal. 34, [165 Pac. 1].

Therein it was held that "the law requires and the form of bond on appeal in a criminal case set out in the code provides that the sureties shall bind themselves in the event of the appealing defendant failing to do certain things they will pay to the state of California a specified penal sum; and such a bond is insufficient where the sureties merely agree that their principal upon default in its terms will pay a specified sum, instead of agreeing themselves to do so."

[2] This is one of the portions of the bond that plaintiff seeks to have reformed. The other defect is equally objectionable and arises from the fact that the order of the court provided that the defendants be admitted to bail in the sum of five hundred dollars each, whereas, the bond, as given, purports to be on behalf of both defendants and provides that if the conditions were not performed, "that he or they will pay to the people of the state of California the sum of one thousand dollars." They were thus obligated to pay said sum if either or both of said defendants failed to appear, whereas, the order required a penalty of only five hundred dollars for each.

[3] It is not disputed that the bond in a criminal proceeding is purely statutory and must conform to the statute and the order of the court. If it fails to do so, it is not good even as a common-law obligation. (*San Francisco v. Hartnett*, 1 Cal. App. 652, [82 Pac. 1064]; *Malheur County v. Carter*, 52 Or. 616, [98 Pac. 489]; *Boozar v. City of Atlanta*, 18 Ga. App. 732, [90 S. E. 492].)

[4] Neither is it disputed that a bond in a sum greater than the order of the court is absolutely void. (*Roberis v. State*, 34 Kan. 151, [8 Pac. 246].)

United States v. Goldstein's Sureties, 1 Dill. 413, [Fed. Cas. No. 15,226], is a leading case in which a person was arraigned before a United States commissioner upon two separate charges. The commissioner ordered him to bail in the sum of five hundred dollars on one charge and two hundred dollars on the other. One bond for seven hundred dollars was taken. Defendant failed to appear and the bond was forfeited. The court said: "Bonds or recognizances of this character are binding only when taken in pursuance of law and

the order of a competent court or officer. No order was made authorizing a single bond for seven hundred dollars and the bond taken was a substantial departure from the bonds required by the commissioner and was not therefore obligatory on the sureties. (*State v. Buffam*, 2 Fost. (22 N. H.) 267.) Judgment accordingly."

In the *Roberts* case the supreme court of Kansas held that, "where the district court directs bail to be taken in the penalty of one thousand two hundred dollars, and the sheriff requires and accepts from the principal and his sureties a bond in the sum of \$1,250, the bond is utterly void, as the sheriff is only authorized to require bail in such an amount as is directed by the court."

The bond executed by the defendants herein was, therefore, not only not binding upon them because they did not agree to pay anything themselves, but it was absolutely void because it was in an amount in excess of the order of the court.

[5] Plaintiff, however, claims that the court has authority to make a new undertaking for the sureties, not in accordance with the obligation that they actually signed, but in accordance with the intention which they had at the time but failed to express. This seems a rather startling proposition, but it is claimed by appellant that respectable authority exists for the contention.

We think, however, that no authority can be found for the proposition that an undertaking, which is void upon its face, can be amended by changing the express obligation of the sureties to something different but what they intended and make it binding upon them after said purported undertaking has been declared forfeited.

In 34 Cyc. 926 we find the statement: "Where an instrument is immoral in its tendency, or for some fundamental reason is void, reformation would amount to the making of a new contract, and is therefore never granted."

In *Wallen v. State*, 18 Tex. App. 414, it was held that a bail bond is strictly a statutory bond, and to entitle the state to a forfeiture thereon, the bond must contain all the requisites prescribed by statute. It is true that no effort was made therein to reform the bond, but the court, after quoting from Pomeroy his statement of "all the possible modes in which the remedial jurisdiction occasioned by mistake can be exercised," declares:

"But we are clearly of the opinion that these rules have no application to statutory bail bonds."

However, appellant relies upon the case of *Neininger v. State*, 50 Ohio St. 394, [40 Am. St. Rep. 674, 34 N. E. 633], for the contrary doctrine. Therein it was, indeed, stated, that "a written instrument executed by a surety, which by mistake fails to express the actual agreement and intention of the parties, may be reformed upon parol proof, like other written instruments and then enforced against the surety."

But it is quite apparent that the *Neininger* case differs from this in two important particulars. In the first place, it was not a void instrument, but simply defective in reciting the name of the prosecuting witness. In other words, a clerical mistake was made that did not affect the obligation of the sureties. No new contract was made for them, but the contract which they actually executed was more clearly identified. Again the sureties in that case entered into a *recognizance*, that is, they appeared before the justice of the peace and acknowledged their obligation to pay the state the sum of three hundred dollars in case the accused failed to appear at the next term of court. This *recognizance* constituted their obligation, and the mistake was made in entering it in the docket of the justice. If the sureties herein had actually executed the contract as set out in the exhibit "B," but in copying it, it was made to appear as exhibit "A," the mistake, of course, could have been corrected, but plaintiff is trying to have substituted for the instrument, which was executed and upon which the defendants were released, an entirely different instrument, which never has been executed and which could not be made effective now because there would be no consideration to support it.

It must be remembered that the statute (section 1278 of the Penal Code), provides the form of the undertaking and requires that it shall be executed and acknowledged by the sureties and that they must justify before the magistrate. Thereupon the defendant may be discharged from custody. Admittedly, no such undertaking was *executed* in this case. The attempt was entirely abortive, but because the parties intended to comply with the law, appellant claims virtually that the intention should take the place of the deed. The law requires a written promise, and that before the defendant is released, not merely an intention to make a promise

which may be made a matter of record *after* the defendant has been released. A careful consideration of the different modes of equitable relief on the ground of mistake as recited by Pomeroy can leave but little doubt that none of them applies to a case like this.

We think the court below was entirely right in sustaining the demurrer to the complaint, and the judgment is, therefore, affirmed.

Buck, P. J., *pro tem.*, and Hart, J., concurred.

[Civ. No. 2618. Second Appellate District, Division One.—March 4, 1919.]

CALVIN PEARSON, Appellant, v. H. K. WHEELER, as Administrator, etc., Respondent.

[1] **BROKERS — ACTION FOR SHARE OF COMMISSION ON SALE OF REAL ESTATE.**—In this action against defendant's intestate upon an alleged oral contract to assist defendant in locating land and to assist in selling the same, for a consideration of one-third of the commission received by defendant's intestate on the sale of the land, a nonsuit was properly granted, the evidence failing to prove that defendant's intestate received any commission on the sale as made.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

Randall & Bartlett for Appellant.

John H. Miller for Respondent.

CONREY, P. J.—Plaintiff appeals from a judgment of nonsuit.

The plaintiff alleges that he entered into an oral contract with J. Kittredge Wheeler whereby plaintiff was to render services to Wheeler in locating and examining land for particular purposes specified by Wheeler; that plaintiff should assist Wheeler in selling any land so located and examined; that

out of any sale consummated in pursuance of said contract Wheeler would pay or cause to be paid to the plaintiff one-third of any commission received by Wheeler from the sale of any such lands. Plaintiff further alleged that he performed all services which by the terms of said contract were to be performed by him; in particular that the plaintiff located and examined a tract of land in Madera County, known as the Lauganour tract, and assisted Wheeler in selling the same; that out of the sale of said tract defendant received as commission therefor the sum of nine thousand dollars; that plaintiff became entitled to one-third of said commission, but that Wheeler refused to pay and has not paid to plaintiff the same or any part thereof.

The answer, which was filed by Wheeler, denied that he entered into any contract with the plaintiff whereby the plaintiff was to render services to the defendant in locating and examining land. As there is no evidence in the record tending to show that the contract included any such purpose or any agreement concerning the same, we may dismiss that element of the case from further consideration. The answer "admits that it was agreed between the said plaintiff and the defendant that the plaintiff should have one-third ($\frac{1}{3}$) of any commission earned for the sale of the tract of land known as the Phil Lauganour Tract, if the said plaintiff and said defendant should be successful in selling said land." The answer admitted that the plaintiff did take defendant to see the Lauganour tract and defendant examined the same; denied that the plaintiff assisted the defendant in selling said tract; denied that out of the sale thereof the defendant received a commission of nine thousand dollars, and denied that the plaintiff was according to the terms of any contract between them entitled to one-third of nine thousand dollars; admitted that the plaintiff and the defendant co-operated in an effort to sell said tract of land, and that if said sale had been made as the result of the effort of the plaintiff and the defendant, the plaintiff would have been entitled to one-third of the commission which might have been earned; denied that the defendant received as a commission for the sale of said tract the sum of nine thousand dollars or any other sum, but, on the contrary, alleged that the defendant became the purchaser thereof; admitted that there was an understanding between the plaintiff and the defendant that if the defendant should effect the

sale of any lands which the plaintiff had for sale, the commission earned and paid should be equally divided; alleged that no sales were made by the plaintiff and the defendant under said understanding, and that no services were rendered by the plaintiff to the defendant, except plaintiff did show to the defendant certain tracts of land which he desired to sell; alleged that the plaintiff was paid a large sum of money by the agent who held the option and through whom the defendant purchased the said Lauganour tract.

[1] The evidence produced by the plaintiff at the trial of this action did not tend to establish the existence of any contract for the division of commissions between the plaintiff and Wheeler other than the terms of agreement as admitted in the answer. Therefore, it only remains necessary to see whether the evidence shows that Wheeler received a commission for the sale of said land, and, if he did receive such commission, determine whether the plaintiff, under the terms of the contract as admitted, became entitled to a part thereof.

The evidence shows that at the time when Wheeler was negotiating for this land he was acting for or in connection with one C. J. Bills; the consideration was paid partly in money and partly by the execution of a mortgage for the remainder of the purchase price. The money was paid by Bills, but the deed was made to Wheeler, and Wheeler, together with his wife, executed the mortgage. Following that transaction, Wheeler conveyed the property to Bills, subject to the mortgage. Wheeler and Bills conducted their negotiations with a real estate partnership which held an option on the property. Gus W. Anderson, a member of that firm, testified that in figuring out the sale price of the land the gross purchase price named was \$195,739; that no commission was paid, but the sum of five per cent was deducted from the purchase price and counted as a commission; that the actual price paid (which necessarily would include the mortgage) was \$185,953. Presumably, on account of the death of Mr. Wheeler and the consequent disability of the plaintiff to testify concerning the transaction, there is no evidence either from Wheeler or from the plaintiff as to whether any commission was actually received by Wheeler. The record is equally wanting in direct testimony showing whether Wheeler made a resale of the property to Bills, thereby obtaining some profit to himself, or whether Bills was the actual original purchaser, taking the

property in the name of Wheeler. The latter inference is more strongly indicated by the evidence. Bills himself, called as a witness by the plaintiff, testified that not a cent of commission was paid on that deal, and that Wheeler did not get out of it one cent, directly or indirectly. Unusual as this circumstance may seem, it stands absolutely uncontradicted. The nonsuit was properly granted upon the stated ground that the evidence failed to prove that Wheeler received any commission on the sale as made.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

[Civ. No. 2878. Second Appellate District, Division Two.—March 4, 1919.]

E. T. OFF, Respondent, v. E. S. CRUMP, Appellant.

- [1] **APPEAL—AMBIGUOUS NOTICE.**—A notice of appeal, ambiguous to the extent that it might be considered an attempt to appeal from an order denying a motion for new trial after such an order had ceased to be an appealable order, but still open to the construction of being a notice of appeal from a judgment in the action, will be so considered.
- [2] **NEGLIGENCE — AUTOMOBILE ACCIDENT — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — PLEADING.**—In an action for damages for personal injuries sustained by the plaintiff being struck by defendant's automobile, an answer denying that the plaintiff was struck by said automobile from any other cause than his own negligence, and alleging that, on the contrary, the collision with the plaintiff and any injuries which the plaintiff sustained therefrom were wholly and solely due to the negligence of the plaintiff, was insufficient to raise an issue of contributory negligence.
- [3] **ID.—FINDINGS SUPPORTED BY EVIDENCE.**—In this action for personal injuries from a collision with defendant's automobile, the findings of the court, both as to the negligence of the defendant and as to freedom from contributory negligence on the part of the plaintiff are supported by the evidence.

APPEAL from a judgment of the Superior Court of Los Angeles County. John L. Hudner, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Duke Stone for Appellant.

Overton, Lyman & Plumb for Respondent.

SLOANE, J.—The plaintiff recovered judgment in this case in the sum of eight hundred dollars for injuries caused from being run into by defendant's automobile. The judgment was entered December 10, 1915. There was a motion for a new trial, which was denied, under an order of court dated January 3, 1916. The notice of appeal recites that the appeal is taken "from an order and judgment entered herein on January 5, 1916, in favor of plaintiff and against this defendant, denying the motion for a new trial and entering judgment against defendant."

[1] The uncertainty and ambiguity of this notice is obvious. Respondent urges that it is notice only of an appeal from the order denying a new trial. At the date of this order and notice an order denying a new trial had ceased to be an appealable order, under amendment of section 963 of the Code of Civil Procedure. Unless the appeal was also taken from the judgment, appellant has no standing in this court. It seems entirely probable that the purpose of the notice was an appeal from the order denying a new trial alone, but, as it is open to a construction covering the judgment as well, and as respondent does not appear to have been misled or prejudiced, we will consider the appeal as properly noticed.

[2] The record comes here on a bill of exceptions, and the only real contention between the parties seems to be on the question of contributory negligence. Respondent objects to any consideration of the evidence applicable to that point on the ground that contributory negligence was not pleaded as a defense. The only matter in the answer suggesting a defense of contributory negligence is, that after controverting the allegations of the complaint charging negligence of defendant in driving his automobile, it is denied "that the plaintiff was struck by said automobile from any cause other than his own negligence," and it is alleged that, "on the contrary, the collision with the plaintiff, and any injuries which the plaintiff may have received therefrom, were wholly and solely due to the negligence of the plaintiff." Similar allegations of negli-

gence as against a plaintiff have been held insufficient to raise an issue of contributory negligence in *Crabbe v. Mammoth Channel G. M. Co.*, 168 Cal. 500, [143 Pac. 714], and *Hughes v. Warman Steel Casting Co.*, 174 Cal. 558, [163 Pac. 885]. It is contended, however, by appellant that the case was tried, and evidence introduced, on the theory that contributory negligence had been made an issue. The findings seem, at any rate, to have been framed on this theory, as the court finds "that at the time plaintiff was struck by said automobile he was using reasonable and ordinary care, and was not negligent. That no negligence of the plaintiff contributed to or was the proximate cause of the accident."

[3] Assuming, for the purposes of this case, that the issue was properly before the court, we are of the opinion that the findings of the court, both as to the negligence of the defendant and as to freedom from contributory negligence on the part of plaintiff, are supported by the evidence. That the evidence was sufficient to justify a finding of negligence against the defendant does not seem to be seriously disputed. There is more room for disagreement as to whether plaintiff showed a want of ordinary care contributing proximately to the injuries complained of, but it is a matter on which, under the evidence, reasonable minds might differ, and, therefore, the finding of the court cannot be disturbed.

There is very little conflict in the testimony. The plaintiff started to cross a street, apparently in the business district of Pasadena. He was aware that two automobiles were approaching from different directions; he seems to have kept an eye alternately first on one and then on the other, as he progressed across the street. When near the center of the street, the car approaching from the south, being in close proximity to the plaintiff, sounded its horn. He looked toward it, at the same time taking a quick step or two forward to clear its track. He then turned his face toward the defendant's machine, coming from the north, and which was at some distance from him when he had looked that way just before the horn of the other machine sounded, and was at that instant, without warning, run into by defendant's machine. The defendant admits that he did not see plaintiff at any time before running him down. There is evidence that his attention was distracted from his driving by a dog which he and his wife had in the machine.

The very fact that he did not see plaintiff, in broad daylight, crossing the street, which was not congested with traffic, is evidence in itself that he was not paying attention to his driving. It is said that no significance is to be attached to the fact that defendant did not sound his horn, as plaintiff already knew he was approaching; yet, a timely warning from that source would have notified plaintiff how close he was. Plaintiff could not look both ways at once, but he could have heard from both directions. All these circumstances of defendant's negligence have this bearing on the question of plaintiff's contributory negligence: He had a right, in determining what was the prudent course for him to take, to assume that defendant would drive in a reasonable and cautious manner. (*Medlin v. Spazier*, 23 Cal. App. 242, [137 Pac. 1078].)

To sum the whole matter up, if plaintiff was negligent, it was in attempting to cross the street at all when two automobiles were approaching from opposite directions, and likely to pass each other about where he was attempting to cross. If this is negligence, then foot-passengers will have to keep off the crossings of our business streets. That crossing a street is often dangerous there is no doubt; but it does not follow that it is negligence. On the busy streets of our cities every time a man attempts to cross, in the congestion of teams and automobiles, he takes his life in his hands; but it is one of the dangers incident to the strenuous life of the city. Where this accident occurred there does not seem to have been a great amount of traffic. The two cars in question, according to plaintiff's testimony, were about equidistant from him, and from seven hundred to eight hundred feet apart. Plaintiff, for all that appears, might have had to wait a long time to find the street entirely free from danger. Having attempted to cross, as we think he was probably justified in doing, he seems to have looked about him with a considerable degree of diligence, and probably was negotiating his passage with as much skill as would the average man. There seems to have been the whole width of the street for these automobiles to pass each other, and the plaintiff had no reason to suppose that they would attempt to pass so close together that he could not avoid one without getting into the path of the other. The state motor vehicle law, section 20b, [Stats. 1917, p. 401], requires that "vehicles proceeding in opposite directions shall pass each

other to the right, each giving to the other one-half the road as nearly as possible."

We cannot say that the evidence was insufficient to support the findings.

Judgment is affirmed.

Finlayson, P. J., and Thomas, J., concurred.

[Civ. No. 2840. First Appellate District, Division One.—March 5, 1919.]

CASIMIRA BELTRAN, Appellant, v. W. J. HYNES, as Administrator, etc., et al., Respondents.

[1] **ESTATES OF DECEASED PERSONS—ACTION TO ENJOIN DISTRIBUTION—FINAL DECREE.**—An action will not lie to enjoin an administrator from delivering property under a decree of distribution upon the ground alleged in the complaint that the plaintiff is an illiterate aged woman, a nonresident, and had no knowledge of the death of the decedent or of the probate proceedings until long after the time for an appeal from the decree had expired, there being no claim that due and legal notice of the hearing of the petition had not been given nor any claim made of the existence of any fiduciary relation between plaintiff and defendant, or of the existence of extrinsic or collateral fraud.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Thomas F. Graham, Judge. Affirmed.

The facts are stated in the opinion of the court.

Bradley V. Sargent and Vincent Surr for Appellant.

Cullinan & Hickey, S. M. Shertridge, A. E. Bolton and Chas. S. Peery for Respondents.

KERRIGAN, J.—This is a suit in equity to enjoin an administrator from delivering certain property to defendant under a decree of distribution.

The trial court sustained a demurrer to the complaint without leave to amend, and discharged an order to show cause why

a preliminary injunction should not issue. The appeals are from such judgment and order.

From the record it appears that Juana Beltran de Marshall died testate on July 7, 1912, and that a decree was entered in her estate distributing the property to defendant Jose Maria Beltran, a nephew of deceased. This decree was entered January 5, 1916, and was subsequently affirmed on appeal. This action was brought to enjoin the administrator from delivering the property under the decree, and for judgment that Jose Maria Beltran holds the title thereto in trust for plaintiff.

By her complaint plaintiff alleges herself to be a niece of decedent, and recites that she is an illiterate single woman eighty-four years of age, and that she is a resident of the village of Cosala, in the Republic of Mexico, and that she never heard of or knew of the death of Juana Beltran de Marshall, or of the judgment for the distribution of her estate, until long after the time for appeal from said judgment had elapsed. She further alleges that defendant Beltran did not notify her of the death of decedent or of the proceedings on distribution.

[1] No claim is made that due and legal notice as provided by law was not given of the hearing of the petition for distribution, nor is there any claim of the existence of any fiduciary relation existing between plaintiff and defendant, or of extrinsic or collateral fraud. Under these circumstances the demurrer was rightfully sustained. Defendant was under no legal duty to notify plaintiff of the death of deceased, even assuming that he knew the plaintiff (*Mulcahey v. Dow*, 131 Cal. 73, [63 Pac. 158]); and proper notice having been given of the hearing, plaintiff is barred by the decree. (*Langdon v. Blackburn*, 109 Cal. 19, [41 Pac. 814]; *Warren v. Ellis*, 39 Cal. App. 542, [179 Pac. 544].)

Affirmed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 1, 1919.

All the Justices concurred.

[Civ. No. 1935. Third Appellate District.—March 6, 1919.]

PAUL F. FRATESSA, etc., Appellant, v. JOSEPH T. ROFFY et al., Respondents.

- [1] **WRITTEN INSTRUMENT—PROMISSORY NOTE OR GUARANTY—MONEY PAYABLE AS DIVIDENDS ON STOCK—MORTGAGE AS SECURITY—ASSIGNABILITY.**—A writing, secured by a mortgage, in the form of a promise to pay one thousand five hundred dollars on or before two years from its date, with interest after maturity, and reciting that the payee has received from the maker certain shares of corporation stock, on which the maker guarantees dividends for two years of \$750, provided that if in two years the dividends received amount to one thousand five hundred dollars, the note is to be canceled, and if they do not amount to \$750 each year, the note shall be credited with the dividends, and the maker at maturity shall pay the balance, is assignable under sections 954 and 1458 of the Civil Code, regardless of whether it be considered a promissory note or a guaranty for the payment of money.
- [2] **CONTRACT OF INDEMNITY.**—There is nothing in the language of the note to support the contention of the respondents that the written instrument constitutes a contract of indemnity against loss incident to the purchase of the stock and that no cause of action could arise therefrom without such loss by the holder of both the shares and the note, and that the note would have no validity where it had been assigned without an assignment of the shares also.
- [3] **ID.—NATURE OF INSTRUMENT.**—The instrument in question was neither a guaranty nor a warranty, but a direct promise to pay money with a proviso for the payment of the amount, in whole or in part, out of the dividends received by the payee from the shares.
- [4] **MORTGAGE—SHARES OF STOCK.**—Where the purchaser of land gave in payment shares of stock and a note, secured by a mortgage on the land with a proviso in the note for its cancellation if the payee received dividends from the shares equal to the amount of the note, such stock did not constitute additional security for the payment of the sum.
- [5] **ID.—FORECLOSURE—PARTIES.**—A mortgagor who has disposed of his entire interest is an unnecessary party to the foreclosure of a mortgage.
- [6] **ID.—PLEADING.**—In a foreclosure action a defense that the land has been exonerated from liability must be specially pleaded.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge. **Reversed.**

The facts are stated in the opinion of the court.

J. J. West, Paul F. Fratessa, Frank J. O'Brien and John W. Johnson for Appellant.

Arthur C. Huston and Thomas B. Leeper for Respondents.

BURNETT, J.—The action was brought by the assignee to foreclose a mortgage on land located in Sacramento County. The written obligation to secure which the mortgage was given was as follows:

“\$1500.00

Oakland, Calif. Oct 26th, 1907.

“On or before two-years after date I promise to pay Geo. L. Woodford, or order, the sum of Fifteen Hundred Dollars, Gold Coin of the United States, with interest at the rate of one per cent per month from and after maturity, value received. If the principal and interest, or either shall not be paid when due then the whole of the said indebtedness shall be due and collectible at the option of the holder hereof. This note is upon the following conditions as to its payment prior to its maturity, or at maturity, that inasmuch as George L. Woodford has received from the maker hereof Two thousand shares of the capital stock of the Roffy Electrical Company upon which the maker hereof has and does guaranty a dividend each year for two years from January first 1908 of 750.00 dollars. If therefore in the said two years dividends have been received by Woodford on the said shares to the full sum of 1500.00 dollars then this note to be canceled. If the said dividends during said two years does not amount to 750.00 each year, then this note shall be credited with the dividends whatever they may be and the maker hereof shall then at maturity pay the balance.

“(Signed) JOSEPH T. ROFFY.”

On January 11, 1910, the said Woodford assigned the said note and mortgage to John H. Davidson, who commenced this action. He afterward assigned to Paul F. Fratessa, who has been substituted as plaintiff. The summons was not served on Roffy, he having disposed of his interest in the mortgaged land before this action was commenced. The complaint was answered by defendants, W. H. Leeper, G. D. Richey, and M. D. Butler, as administrator of the estate of James A. Butler, deceased, successors to Roffy's interest in the land mortgaged by

him to Woodford. They denied the execution of the assignment by Davidson to Fratessa and the nonpayment of the note.

[1] There seems to be some contention by respondents that there can be no assignment of the said written instrument—of the note and mortgage. However, there appears to be no question about that, since whether the said written instrument be considered a promissory note or a guaranty for the payment of money, it was plainly assignable by virtue of the provisions of sections 954 and 1458 of our Civil Code. There are many decisions, also, cited by appellant to the point that such obligations are assignable, but we deem it unnecessary to notice them.

[2] We are entirely satisfied, also, that respondents are entirely in error in contending that the said written instrument constitutes a contract of indemnity against loss incident to the purchase of the shares of stock, and that no cause of action could arise therefrom without such loss by the holder of both the shares of stock and the note, and that the note would have no validity where it had been assigned without an assignment of the shares. There is nothing in the language of the note or of the mortgage to support this view. It is true that the maker used the word "guaranty," but it is not contended by respondents that there was any guaranty, as that term is understood by the authorities. It is claimed, however, by them that the maker "warranted" the payment of said dividends and that he intended to indemnify the payee against loss in consequence of any failure of said dividends. But, it must be understood that Roffy was a debtor and Woodford a creditor to the extent of one thousand five hundred dollars. In other words, that the former obligated himself to pay the latter the said sum, and, if the stock should pay any dividends, the amount was to be credited on the payment of said one thousand five hundred dollars. In other words, Woodford was to pay himself out of said dividends a portion or all of the said money which Roffy promised to pay, and, if no dividends were obtained, the amount of one thousand five hundred dollars was to be paid by said Roffy. There could, therefore, be no loss to Woodford, by reason of the nonpayment of dividends, since the amount was to be paid at any rate. The condition in reference to the application of any dividend that might be received to the payment of the claim was a favor to Roffy and could not be a detriment to Woodford. In fact, if the obligation be considered in any sense a "warranty," it amounted

to nothing more than a "warranty" that Roffy would pay his own debt either from the dividends or otherwise. [3] The truth is, that the instrument constitutes a direct promise of the maker to pay Woodford the sum of one thousand five hundred dollars, with the proviso that Woodford might pay himself this amount, or a portion thereof, out of any dividends that might be received from said stock.

When we consider the mortgage itself, we find it was given entirely and exclusively for the purpose of securing the payment of the debt of one thousand five hundred dollars, according to the terms of said promissory note. There is not a word in said mortgage in reference to any warranty or guaranty or indemnity.

The language of the mortgage, as far as necessary to quote, is as follows: "That the mortgagor mortgages to the mortgagee that certain parcel of land (describing it) as security for the payment to the said mortgagee of the sum of fifteen hundred (\$1,500.00) dollars with interest thereon according to a certain promissory note of even date herewith, made by said mortgagor to the mortgagee herein."

[4] We may add that there is nothing in the evidence in the case to support the theory of respondents as to indemnity. The only testimony on the subject is that of Woodford, who declared that he sold the land to Roffy for two thousand shares of stock in a certain corporation and one thousand five hundred dollars in cash, but for the cash was substituted a note secured by the mortgage. In other words, it appears without conflict that Woodford became the owner of the stock and that the note and mortgage were given to secure the payment of the sum of one thousand five hundred dollars in cash.

The foregoing facts show, also, the fallacy of the position of respondents that the stock also constituted security for the payment of said sum. It follows that they are mistaken in the contention that the mortgage herein could not be foreclosed against respondents without taking into account said stock. There was no occasion for an election between two securities, since only one security was given to secure the payment of said one thousand five hundred dollars. Neither is there any ground for the contention that plaintiff is estopped from foreclosing the mortgage by reason of the fact that Woodford never notified respondents that the stock had failed to pay dividends and that he would hold their land under the mort-

gage. He was not required to give any such notice. The recordation of the mortgage was sufficient to notify all subsequent purchasers and encumbrancers that the land was held as security for the payment of said one thousand five hundred dollars. Nor was he required to begin an action to foreclose the lien, nor was there anything in the agreement between him and Roffy to preclude the assignment of said note and mortgage. If the respondents were led to believe that the stock had paid dividends to the amount of the note, it was their own fault. If they had any reason to so believe, they could and should have made inquiry of Woodford, and we cannot see anything inequitable in his conduct in respect to the nonpayment of said dividends. In fact *that*, as we have seen, was a matter of interest exclusively to himself and Roffy.

Another point made by respondents is, we think, more debatable. It grows out of the fact that the plaintiff failed to bring the maker of the note into court, it being claimed by respondents that plaintiff dismissed said action and waived deficiency against Roffy, the maker, and proceeded to trial over the objection of defendants. It is contended by respondents, and this view seems to have been adopted by the trial court, that by so doing he released the claims of the subsequent purchaser and junior mortgagee from the burden of the mortgage.

Coyle v. Davis, 20 Wis. 564, 568, involved the interest of a subsequent purchaser of a portion of the mortgaged premises, and it was held that the release of the mortgagor by the mortgagee from any personal liability discharged the land from the lien of the mortgage. The court said: "The plaintiff and her husband, by their purchase of a portion of the mortgaged premises, acquired the right to redeem from all the mortgages by paying the entire mortgage debt, and then to obtain satisfaction by the foreclosure and sale of the residue of the premises, and if they proved insufficient to resort to the personal liability of Jarman, the mortgagor. . . . She stands in the relation of a surety for Jarman, and any agreement between Joseph Davis and him, which operated to diminish her security or to increase her liability was a release of all obligation on her part. The right of insisting upon the personal liability of Jarman was one of the safeguards of the plaintiff's title, and, by voluntarily depriving her of that, Joseph Davis deprived himself of the right of insisting upon the liens of his mortgages upon the lands owned by her."

In *Sexton v. Pickett*, 24 Wis. 346, it was held that "a mortgagee who diminishes the security of a second mortgage, by releasing the mortgagor's personal liability, if he does not absolutely discharge the premises from the lien of his mortgage as in the case of a subsequent purchaser at least subordinates his lien to that of such second mortgage."

The answer of appellant to these cases is that they "cannot apply to the case at bar where there was no release of Roffy's, the mortgagor's, personal liability," and it is further contended that the law has been virtually declared otherwise by the supreme court of this state. The fact that the mortgagor was not served with summons would not, of course, relieve him from personal liability. Nor did appellant acquit him of any further liability for the indebtedness. He simply announced: "We are not asking for a deficiency judgment against him." Manifestly, he could not obtain such judgment when Roffy had not been brought within the jurisdiction of the court. [5] There is nothing in the law or in equity to compel the plaintiff to proceed against the mortgagor where he had disposed of his entire interest in the land. Respondents were interested in the matter because they were redemptioners and had the legal right to be subrogated to the claims of the senior mortgagee. But in order to discharge the lien it would be necessary for them to pay the entire debt and, therefore, they should have the benefit of any deficiency judgment that might be obtained against the mortgagor. The conduct of plaintiff did not prejudice this right. They could have had the mortgagor brought in and all the equities determined in the one proceeding. They did not choose to do so, and they cannot complain because plaintiff did not see fit to relieve them of this trouble.

Appellant also relies upon the case of *Gutzeit v. Pennie*, 98 Cal. 327, [33 Pac. 199]. Therein the court said: "The only question in the case at bar requiring special notice is this: 'Is a judgment foreclosing a mortgage valid as against grantees of the mortgagor and subsequent encumbrancers although a representative of the deceased mortgagor is not before the court at the time of the judgment—the plaintiff waiving all recourse against any of the property of the estate except the mortgaged premises?' " The court held that said judgment was valid as against said parties. Respondents contend that the only thing decided in that case was that the representative

of the deceased mortgagor was not a necessary party to the foreclosure. But there was virtually a waiver of all personal liability of those succeeding to the interest of the mortgagor in the land mortgaged. This would seem to affect the security and liability of the subsequent grantees and encumbrancers in the same manner as if there had been a release from liability of the mortgagor if living. In support of its position the court quotes from *Schadt v. Hepp*, 45 Cal. 437, and *Hibernia Sav. & L. Soc. v. Herbert*, 53 Cal. 378, and cites *Belloc v. Rogers*, 9 Cal. 124, *Goodenow v. Ewer*, 16 Cal. 461, [76 Am. Dec. 540], Story on Equity Pleadings; 197, and Pomeroy on Remedies, sec. 326, and notes. In the *Belloc* case there were two mortgages, and the junior mortgage was foreclosed first and the property purchased by the mortgagees therein. The senior mortgagee then brought suit to foreclose his mortgage, making the mortgagor and the second mortgagees parties, and he had personal service upon the mortgagor, but before judgment the mortgagor died and his administrator was made a party defendant.

The judgment was for the amount of the mortgage debt, for a sale of the premises; and in case the proceeds were not sufficient, then a judgment for the residue. The appeal was by the administrator and only from that part of the judgment ordering a sale of the premises. The case is hardly analogous to this, and in the language of the supreme court the only question for solution was "whether the facts being admitted showing the first and second mortgage, and the sale of the equity of redemption under the second mortgage, the estate of Saroni had such an interest in the premises as to render it necessary that the probate court should order the sale, upon the application of the administrator or of the plaintiff, and to oust the district court of jurisdiction to order a sale." In the course of the opinion a quotation was made, however, with approval from *Bigelow v. Bush*, 6 Paige (N. Y.), 345, that "the grantee of the mortgagor could not complain if the mortgagor was not made a party, for the reason that the grantee could not be injured."

Goodenow v. Ewer, *supra*, embraces a comprehensive consideration of the nature of a mortgage and the proceedings provided by our law for its foreclosure, and it was held that the grantee of the mortgagor was a necessary party to the suit for foreclosure in order to enforce the lien against his interest,

the court saying: "It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court that a valid decree can pass for its sale." It was further held that the bid by the plaintiffs, being for the full amount of their judgment, satisfied it, and the effect of this satisfaction was to discharge from the lien of the mortgage the portion held by the grantee who was not made a party. It thus involved a different question from the one before us, but the court reiterated the rule as to the mortgagor not being a necessary party where he has disposed of his interest and no deficiency judgment is sought against him.

The declaration from Story is: "Where the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill to foreclose."

Pomeroy states: "It follows as an evident corollary from the proposition just stated, that the mortgagor who has conveyed away the whole of the mortgaged premises is no longer a *necessary* party defendant in a foreclosure action, that is, he is not indispensable to the rendition of a simple judgment of sale, if no decree for a deficiency is asked."

The decision in the 98th California thus seems to support appellant's view of the rule, but many authorities hold with Jones on Mortgages, section 727, as follows: "But if a mortgagee releases the mortgagor from personal liability, he thereby diminishes the security of a subsequent purchaser of part of the premises, and, therefore, the lien of the mortgage, so far as the rights of such subsequent purchaser are concerned, is discharged."

Respondents contend furthermore that the mortgage was satisfied as to them because plaintiff with full knowledge of their status released land of greater value than the amount due on his mortgage. He released, so it is stated, "the land of defendant Howes of the stipulated value of \$1,457.20, and the land of defendant Reclamation District 1,000 by dismissing as to them, of the value of \$1,085.50, and he entered into an agreement with defendant Butler that the latter would pay him one-half the amount of his mortgage independent of the result of this suit." As we understand the record, this latter amount is about \$750. Thus it is claimed that plaintiff has virtually received "through his releases and agreement about \$3,500, as against \$2,150, paid for the mortgage." However, as to the land of the Reclamation District, it ap-

pears that a portion of the consideration at least was paid to respondents, but, we may eliminate that entirely and the principle contended for will apply, since the sum of \$1,457.20 and \$750, exceeds the amount paid by plaintiff for the mortgage.

The reason for this claim of respondents is that the grantee and the subsequent mortgagee of the whole or of a portion of the premises are redemptioners of the whole of the land subject to the original mortgage, and their right cannot be prejudiced by the release or sale of a portion without their consent and without applying its value to the reduction of the amount secured by the senior mortgage. In this respect, since they are subrogated to his rights, their situation is similar to that of the original mortgagor where the mortgagee has released without the former's consent. In *Woodward v. Brown*, 119 Cal. 292, [63 Am. St. Rep. 108, 51 Pac. 4], it is said: "We cannot perceive upon what principle of equity or by what construction of this section (sec. 726, Code Civ. Proc.) it can be held that the mortgagee may without the consent of the mortgagor, let go a part of the security to a purchaser from the mortgagor, at less than its value may be, and then look to the mortgagor to make up the deficiency. It would be a gross injustice to the mortgagor to hold him liable for a deficiency which the mortgagee has without the mortgagor's authority or consent created. The deficiency which the code directs may take the form of a personal judgment is a deficiency arising from the sale of all the mortgaged security and not a part of it."

In *Merced Sav. Bank v. Simon*, 141 Cal. 11, [74 Pac. 356], it was held that "where subsequent to the execution of a mortgage the mortgagor granted a right of way over the mortgaged lands to a third party, the mortgagee could not, subsequent to that deed prejudice the owner of the right of way by releases of other portions of the mortgaged premises."

In section 4841 of Elliott on Contracts the author, after stating that the second mortgagee has the right to redeem the property from the prior mortgage, says: "The second mortgagee, in such cases, stands in the place of the mortgagor, having the same rights and coming within the exception of a statute which provides that recorded mortgages 'shall not be valid against any person other than the parties thereto.'"

Many authorities sustaining this position of respondents might be cited and the principle seems to be pretty well established. The point is made, however, by appellant that there is no finding that said release of a portion of the land was not agreed to by respondents. It is clear that in order to have said release operate as a payment of the mortgage debt as to respondents, the release must have been without their consent, and unless so established it does not constitute a defense to the action. [6] Again, it is settled that in a foreclosure action a defense that the land has been exonerated from liability must be specially pleaded. (*Barnhart v. Edwards*, 5 Cal. Unrep. 558, [47 Pac. 251]; *Cassinella v. Allen*, 168 Cal. 677, [144 Pac. 746].) There was no such pleading in the case.

Of course, the settled rules of pleading and practice should be observed as far as possible to promote uniformity in the administration of justice. These suggested defects may be easily remedied in case of a new trial, but as the record is presented, it is believed that the judgment should be reversed, and it is so ordered.

Buck, P. J., *pro tem.*, and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 5, 1919, and the following opinion then rendered thereon:

THE COURT.—In their petition for modification of the opinion and judgment respondents claim that we should disregard the contention of appellant that it was necessary for the defendants to plead “that the land had been exonerated from liability, and, also for the court to find that said release was not agreed to by respondents.” This claim is based upon the proposition that appellant makes the contention for the first time in his closing brief. However, the contention of appellant is in response to the claim of respondents in their brief that “the mortgage was satisfied as to the contesting defendants because plaintiff released land of greater value than amount of mortgage.”

The rule invoked by respondents is, therefore, hardly applicable to the case. It is true that some evidence was received on the subject without objection, and it appears that the cause was tried upon the theory that such an issue was

made. This would preclude appellant from thereafter making the objection that the matter was not pleaded. However, there is no finding upon the subject, and under the view we take of the case, the findings that are made are insufficient to support the judgment.

It is claimed by respondents, furthermore, that it was understood and virtually agreed in the court below that this case and *Richey v. Butler*, *post*, p. 314, [180 Pac. 652], relating to mortgages on the same piece of land, should be considered together, and that the evidence in both cases might be considered in the determination of each.

It is, furthermore, claimed that the evidence in the latter case sufficiently showed that the note and mortgage in this case had been paid and discharged. We have no reason to doubt the statement of counsel in this respect, but there is nothing in the record before us to show that such was the understanding, and, moreover, there is not even any contention that it was agreed that both records might be considered by this court. It would be a departure from well-established practice in appellate proceedings to permit the record to be thus modified or changed. Furthermore, there is no finding in this case that the note has been paid or the mortgage released or discharged.

We can find no authority for changing the record and modifying the judgment, as requested by respondents. If they are right in their theory, the matter can be easily adjusted in the lower court, but, in view of what is before us, we think the petition must be denied, and it is so ordered.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 5, 1919.

All the Justices concurred.

[Civ. No. 2580. First Appellate District, Division One.—March 6, 1919.]

MARY E. RAMSAY et al., Appellants, v. MCCREERY ESTATE COMPANY (a Corporation), Respondent.

- [1] **APPEAL—ORDER GRANTING NEW TRIAL—DISCRETION.**—A motion for a new trial is addressed to the discretion of the trial court, and its discretion in granting a new trial can be disturbed only when it is made to appear that that discretion has been abused.
- [2] **NEGLIGENCE—ELEVATOR ACCIDENT—ACTION FOR DEATH OF PASSENGER.**—In this action for damages for death alleged to have been caused by the negligent operation of an elevator, the record showed no abuse by the court of its discretion in granting a new trial after verdict for the plaintiff.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. George A. Sturtevant, Judge. Affirmed.

Sullivan & Sullivan and Theo. J. Roche for Appellants.

McPike & Murray and Redman & Alexander for Respondent.

KERRIGAN, J.—This is an appeal from an order granting the defendant's motion for a new trial after verdict and judgment for plaintiffs.

The action was brought by the widow and children of one Adam Ramsay to recover damages for his death, which it is alleged was caused by the negligent operation by defendant of an elevator in a building owned by it, and in which the deceased was employed by a company having offices therein. Ramsay was sixty years of age and received a salary of \$250 a month. The jury rendered a verdict for the plaintiffs in the sum of twenty-five thousand dollars. The trial court set this verdict aside upon the ground of the insufficiency of the evidence to support it, and plaintiff appeals from this order.

[1] The granting of a new trial depends upon the legal discretion of the court, guided by the circumstances of the case. The motion is addressed to the sound discretion of the trial court, and when that discretion has not been abused, the order upon the motion will not be disturbed. We have

carefully examined the record, and we fail to find any abuse of discretion in the granting of the order.

The only witness to the accident was the operator of the elevator, and his testimony both before the coroner's jury and at the trial was mostly given through an interpreter. In substance it appears therefrom that Ramsay left his office, which was located on the sixth floor of the building, about 9 o'clock in the evening, went to the elevator and rang the bell. The operator, who was also a janitor of the building, was at that time engaged in his work on the seventh floor, but hearing the bell he entered the elevator and started it down to the sixth floor. When at a short distance above said floor he brought the car to a stop preparatory to slowly lowering it and adjusting it to the floor level. After bringing the car to a stop he started it again very slowly and again lowered it a short distance, holding the controller-bar in his left hand, and while the car was slowly descending he raised with his right hand the latch to the door and began to open it slowly as the floor of the car was descending to a position flush with the sixth floor. At that time Ramsay, who was standing in front of the door, called out, "Quick, quick!" and when the door had been opened slightly he took hold of the partially opened door with both hands and shoved it back, against the protest of the operator, who called upon him to stop. When Ramsay attempted to enter the car, the floor of which was still somewhat above the level of the floor of the building, he stumbled and fell against the right side of the operator, pivoting him around so that the operator's left hand shoved the controller-bar forward, causing the elevator to reverse its motion and quickly rise. As Ramsay fell against the operator and down upon the floor the operator grabbed hold of him, but before he could drag him into the car the floor thereof had ascended to the top of the door, and Ramsay was caught between the grill work above the door and the floor of the elevator, and his body fell into the pit.

From this evidence it is claimed by defendant that the deceased met his death from his own imprudence in attempting to enter the elevator in the manner indicated.

[2] Plaintiffs contend, however, that statements made by the operator immediately after the accident to certain police officers as to the manner in which the accident occurred are contrary to and inconsistent with his testimony at the trial.

They also claim that his testimony at the trial is in conflict with his testimony given at the coroner's inquest. No useful purpose would be subserved by an analysis of these claimed inconsistencies. Assuming that they exist and that together with the presumption of negligence arising by reason of the accident they support plaintiff's claim for negligence, the trial court, having heard the evidence and having had ample opportunity to judge as to the demeanor, manner, and credibility of the witnesses, had the right, if dissatisfied with the verdict, and if it was of the opinion that it was clearly against the weight of the evidence, to set it aside and grant a new trial, even though there was a substantial conflict, as it is not bound by the rule as to conflicting evidence. The opinion of the trial court being that the evidence was insufficient to support the verdict, its discretion in granting a new trial can be reviewed only when it is made to appear that that discretion was abused; as before stated, the record shows no such abuse.

For the reasons given the order of the trial court is affirmed.

Waste, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 4, 1919.

[Civ. No. 2331. Second Appellate District, Division One.—March 7, 1919.]

M. E. POST, Appellant, v. GEORGE C. FETTERMAN et al.,
Respondents.

[1] **APPEAL—FINDING ON CONFLICTING EVIDENCE.**—In this action on a promissory note executed by a husband and wife, a finding, upon conflicting evidence, that as to the wife the note was executed without consideration will not be disturbed on appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul J. McCormick, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Jesse F. Waterman for Appellant.

F. E. Davis for Respondent Rosa Fetterman.

CONREY, P. J.—This action is upon a promissory note executed by the defendants to the plaintiff. The court found that as to the defendant Rosa Fetterman, the note was executed without consideration and held that she was not liable thereon. Judgment was entered against the defendant George C. Fetterman alone. Plaintiff appeals from the judgment entered in favor of Rosa Fetterman.

Appellant claims that the finding above noted is not supported by the evidence. This is the only ground of appeal presented for our consideration. The note was given on account of moneys which had been advanced by plaintiff for the benefit of George C. Fetterman. The plaintiff testified that when Mr. Fetterman requested him to advance this money Fetterman promised that he would have his wife sign the note when the amount was fixed, and that as a result of that conversation he advanced the money. Mr. Fetterman, on the other hand, testified that prior to the time of the plaintiff's paying out any money, the matter of a note to be given by George C. Fetterman and Rosa Fetterman was not mentioned at all, and that the plaintiff never at any time requested of him that he should have his wife sign the note. Mrs. Fetterman testified that she did not receive anything at all for the execution of the note, and that she simply signed the note at the request of her husband without reading it. No new consideration accompanied the making of the note. Appellant's counsel argues that the testimony of Mr. Fetterman is not entitled to credit, because he verified the answer and cross-complaint and on the witness-stand admitted certain facts which are in conflict with some of the allegations of his pleadings which he had verified. Nevertheless, the trial court had the right to believe his testimony on the question here at issue. [1] No sufficient reason has been shown to this court on appeal to set aside the judgment merely because a material finding of fact is based upon conflicting evidence.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

[Civ. No. 2656. First Appellate District, Division One.—March 7, 1919.]

DAVID O. CHURCH et al., Copartners, etc., Respondents,
v. JOHN H. GRADY, Appellant.

- [1] **PLEADING—AMENDED COMPLAINT—DEMURRER.**—Where a complaint has been amended, the sufficiency of the last pleading is alone in question on a demurrer.
- [2] **MUNICIPAL ORDINANCES—EVIDENCE—JUDICIAL NOTICE.**—Courts of record do not take judicial notice of municipal ordinances in this state.
- [3] **ID.—PLEADING.**—In pleading a municipal ordinance or a right derived therefrom it is sufficient, under section 459 of the Code of Civil Procedure, to refer to it by its title and the date of its passage.
- [4] **PLEADING—GENERAL DEMURRER—INSUFFICIENT FACTS.**—Where the question of the sufficiency of a complaint to withstand a general demurrer arises, courts have always discriminated between insufficient facts and an insufficient statement of facts, and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated or appearing by necessary implication, the judgment will be sustained.
- [5] **STREET LAW—SAN FRANCISCO ORDINANCE—FORECLOSURE OF ASSESSMENT LIEN—RESOLUTION OF INTENTION.**—In an action to foreclose the lien of a street assessment for work done under the San Francisco street improvement ordinance, the objection that the complaint does not state that the resolution of the board of public works of its intention to recommend to the supervisors that improvements be ordered to be made contains the reference to the specifications or plans and specifications prepared for the improvement contemplated, is sufficiently met by the allegation that the board of public works duly and regularly made an assessment to cover the sum due for the said work so performed and specified in said contract, this being a sufficient allegation under the ordinance that all the steps preceding the making of the assessment necessary to authorize the board to make it had been taken in the manner provided by law.
- [6] **ID.—DEMAND FOR PAYMENT.**—In a suit to foreclose a street assessment lien under the San Francisco ordinance, a failure to prove a compliance with the essential requirement of the ordinance respecting a demand on the owner of the property assessed, for the payment of the amount of the assessment as alleged in the complaint is fatal to the judgment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George E. Crothers, Judge. Reversed.

The facts are stated in the opinion of the court.

Edward J. Lynch for Appellant.

J. E. Manning for Respondents.

WASTE, P. J.—This is an action to foreclose a street assessment lien. The original complaint was apparently framed on the theory that the work was done under the authority of the charter of the city and county of San Francisco. At the trial plaintiffs admitted that the requirements of the charter, necessary to confer jurisdiction in such matters, had not been complied with.

The cause was submitted to the court for decision and was decided in favor of defendant. Thereupon, plaintiffs waived counsel fees and assumed defendant's costs to that date. The court set aside the submission, and permitted plaintiffs to file amendments to their complaint, setting forth facts tending to establish that the proceedings were had under Ordinance No. 2439 (New Series) of the city and county of San Francisco, commonly known as the "Street Improvement Ordinance." By stipulation of counsel said amendments were deemed denied by the answer of the defendant. No further evidence was introduced. The cause was resubmitted and decision and judgment went in favor of plaintiffs. Defendant made a motion for a new trial, one of the grounds being insufficiency of the evidence to justify the decision. The motion was denied. Defendant appeals, urging the same point as one of the grounds for a reversal of the judgment.

[1] Whatever defects may have existed in the original complaint, the demurrer to which was overruled, that pleading was superseded by the complaint as amended after the trial. The sufficiency of the last pleading is alone in question. (*Rooney v. Gray Bros.*, 145 Cal. 753, [79 Pac. 523].) Appellant contends that the complaint, as amended, does not state facts sufficient to constitute a cause of action, by reason of a failure to properly allege the passage and existence of the ordinance of the city and county of San Francisco under which the plaintiff now contends the proceedings were taken.

[2] It is a general rule, supported by unbroken authority in this state, that courts of record do not take judicial notice of municipal ordinances. (*Metteer v. Smith*, 156 Cal. 572,

[105 Pac. 735].) [3] In pleading an ordinance of a municipal corporation, or a right derived therefrom, it is sufficient to refer to such ordinance by its title and the day of its passage. (Code Civ. Proc., sec. 459.) Plaintiff apparently attempted to comply with the section of the code in pleading the ordinance in question. The result is rather an allegation by way of parenthesis than of positive averment, but the title of the ordinance, and the day of its passage are readily ascertainable.

[4] Dealing with this precise question, our supreme court has held that when the question of the sufficiency of a complaint to withstand a general demurrer, and therefore to support a judgment, arises, "courts have always discriminated between insufficient facts and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained." (*Amestoy v. Electric R. T. Co.*, 95 Cal. 311, [30 Pac. 550].)

[5] The ordinance requires that the resolution of the board of public works, if its intention be to recommend to the supervisors that improvements be ordered to be made, shall contain a reference to the specifications, or plans and specifications, prepared for the improvement contemplated. Appellant contends that while the complaint contains an allegation that such plans and specifications were prepared, it is insufficient because it does not state that the resolution contained the required reference. It is to be observed that the complaint does *not* state that the resolution did *not* comply with the ordinance. Furthermore, the complaint alleges that "on the twenty-fifth day of May, 1914, the board of public works duly and regularly made an assessment to cover the sum due for the said work so performed and specified in said contract" (referring to the contract and work upon and for which the assessment was made). This is a sufficient allegation that all the steps preceding the making of the assessment, necessary to authorize the board to make it, had been taken in the manner provided by law. (*Bienfield v. Van Ness*, 176 Cal. 585, [169 Pac. 225].)

[6] The complaint originally contained no allegation of demand, on the owner of the property assessed, for the payment of the amount of the assessment. Both the charter and

the ordinance require that such demand shall be made. No testimony was offered to establish such fact. The warrant, assessment, and diagram admitted in evidence were not accompanied by the affidavit of demand and nonpayment required by the charter, and by the ordinance, in order to constitute *prima facie* evidence of the regularity and correctness of the assessment, and of the prior proceedings, and of the right of the plaintiff to recover in the action. (Charter of the City and County of San Francisco, art. VI, c. II, sec. 15; Ordinance 2439 [N. S.], Part I, sec. 22.)

The complaint as amended, after the first submission of the case, alleged that personal demand was made by an agent of plaintiff. This allegation was deemed denied, under the stipulation before mentioned, but no further evidence was offered to establish the fact. There was, therefore, an utter failure of proof on a vital element in the case. (*Guerin v. Reese*, 33 Cal. 292; *McBean v. Martin*, 96 Cal. 188, [31 Pac. 5].) Notwithstanding such failure of proof the court found that demand was made as alleged in the complaint. This finding was not justified, because it was not supported by any evidence.

The failure of plaintiff to prove a compliance with the essential requirement of the ordinance, respecting a demand, is fatal to the judgment. (*McBean v. Martin*, *supra*.)

The judgment is reversed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 2715. First Appellate District, Division Two.—March 7, 1919.]

PALO ALTO MUTUAL BUILDING AND LOAN ASSOCIATION (a Corporation), Respondent, v. PETER MULLEN et al., Appellants.

- [1] MORTGAGE—FORECLOSURE—APPEAL.—In an action to foreclose a mortgage which was given by the mortgagors to secure a fixed sum and also further advances, and the fulfillment of any covenants or agreements which the mortgagors might agree in writing with the mortgagees should be secured thereby, the finding of the court that the mortgagors had agreed that a certain further advance should

be secured by the mortgage will not be disturbed by the appellate court where the evidence is conflicting.

- [2] **Id.—CONSTRUCTION.**—The construction of the clause in question is that the necessity of an agreement in writing under said clause is limited to the fulfillment of "any covenants or agreements," and does not apply to the further advances designated in the same clause.

APPEAL from a judgment of the Superior Court of the County of Santa Clara. J. R. Welch, Judge. Affirmed.

The facts are stated in the opinion of the court.

Wm. H. H. Hart and T. John Butler for Appellants.

J. S. Hutchinson and Walter Slack for Respondent.

HAVEN, J.—Action for foreclosure of a mortgage executed on January 28, 1909, by Peter Mullen and Mamie Mullen, his wife, to Palo Alto Mutual Building and Loan Association. Said mortgage secured a note of the mortgagors in the sum of four thousand dollars and further advances under the terms of the clause hereinafter set forth. The sum of three thousand five hundred dollars only was advanced on the four thousand dollar note, which sum has been fully repaid. The present action is brought to recover the sum of one thousand dollars, with interest and costs, alleged by plaintiff to have been advanced to the mortgagor Peter Mullen under the terms of the mortgage, and the payment of which is alleged to have been secured by the following clause of the mortgage:

"And also to secure such further advances as may be made to the mortgagors, or either or any of them, by the mortgagee, or on their account, before the satisfaction hereof, and the fulfillment of any covenants or agreements which the parties hereto, their heirs or assigns, may hereafter agree in writing shall be secured hereby."

The judgment was for the plaintiff for the amount of the advance, with interest thereon and costs incurred, with a decree declaring the same to be a lien upon the property described in the mortgage and ordering said property sold and the proceeds applied in payment of that debt. The personal judgment was against the mortgagor Peter Mullen alone, but the interest of the mortgagor Mamie Mullen in the property was ordered sold under the foreclosure decree. The defend-

ants appeal from this judgment, contending, first, that the one thousand dollars in controversy was not advanced under the terms of the mortgage; and, secondly, that under the clause above quoted, no advancement was secured by the mortgage unless agreed upon in writing by both of the mortgagors.

It is admitted that the sum of one thousand dollars was paid to the defendant Peter Mullen by check of plaintiff on June 1, 1911. The controversy is over the question as to whether this payment was made as a further advance under the terms of the mortgage and was intended to be secured thereby, or whether, on the other hand, it was a personal payment from one Marshall Black, the secretary of the plaintiff, on his own account and was not made by the plaintiff as an advance under the terms of the mortgage. Upon this disputed fact the evidence introduced by plaintiff was as follows:

At the time the payment was made to the defendant Peter Mullen, he signed a receipt reading as follows:

"No. 5887. Palo Alto, California, June 1, 1911.

"Received from Palo Alto Mutual Building & Loan Association one thousand & no/100 dollars, on account of secured advance on loan #497.

"PETER MULLEN."

The check was handed to him by the bookkeeper of the secretary, Black, who testified that he was instructed by Mr. Black, at the time the check was issued, to charge it to Mr. Mullen's loan account. In connection with this testimony, the check-book and account-books of the plaintiff were offered in evidence. From these it appeared that the bookkeeper marked the stub of the check as follows: "To Peter Mullen, secured advance \$1000." The first entry in the account-books was made in the cash journal and there appeared as "Secured Advance Peter Mullen, \$1000." The item was also entered in the general ledger of the plaintiff on the page designated as "Secured Advances," and was again posted in the "Secured Advance Ledger," where it appeared under the name "Peter Mullen." It further appeared that in posting the item to the general ledger it was first entered in an account designated as "Suspense Account," which account was conceded to have been a personal account of the secretary, Black. The bookkeeper testified that this last entry was an error and

that it was corrected as soon as discovered, and the court so found. The defendant Peter Mullen and the secretary Marshall Black, both testified that the instructions given to the bookkeeper were to enter this item under the personal account of Black, and that neither of them had any knowledge that the transaction was claimed to have been an advance under the terms of the mortgage until shortly before the present suit was commenced, which was more than three years after the payment of June 1, 1911. It appears from the evidence that the secretary, Black, had purchased an automobile from the defendant Peter Mullen, who had demanded payment therefor. The check of one thousand dollars, which is the basis of this action, was given by Black to Mullen at the time of said demand. It is admitted that this was a personal purchase by Black, and it is contended by the appellants that the whole transaction was had by Black personally and that the plaintiff had no connection therewith, except that Black used the plaintiff's funds in payment of his personal debt. [1] Upon this conflicting evidence the court found that the sum of one thousand dollars was advanced and loaned by plaintiff to the defendant Peter Mullen under the authority of said mortgage "as a further advance under the terms of said mortgage, which said sum said defendant Peter Mullen then and there agreed in writing should be a secured advance under said mortgage." The above finding is supported by the documentary evidence above referred to and by the testimony of the bookkeeper. Appellant's contention upon this finding goes no further than to show that the evidence upon the issue was conflicting. The finding cannot, therefore, be disturbed by this court.

It is next insisted that, even if the one thousand dollars was paid to and received by the defendant Peter Mullen as an advance, the clause of the mortgage above quoted does not warrant the conclusion that such advance was secured thereby, for the reason that the defendant Mamie Mullen, who was one of the mortgagors, did not agree in writing that the same should be so secured. The determination of this contention depends upon the proper construction of the clause in the mortgage as to further advances above set forth. On behalf of the appellants, it is argued that the last clause, "which the parties hereto, their heirs or assigns, may hereafter agree in writing shall be secured hereby," should be

read as referring both to further advances and to the covenants or agreements referred to in the latter portion of the clause. On behalf of respondent, it is contended that by the disputed clause two distinct objects are sought to be secured, viz.: (a) "Such further advances"; and (b) "the fulfillment of any covenants or agreements"; and that the restrictive clause introduced by "which," contained in the last three lines of the above provision of the mortgage, refers to the second of these objects only, namely, to the covenants or agreements. To state it in a different form, it is contended by respondent that the clause is divided into two distinct parts, the first terminating with the word "hereof" followed by a comma, and that the balance of the clause is entirely separate from that which precedes it. The trial court adopted the construction contended for by respondent and included its interpretation of the disputed clause in its findings in the following language:

"That, in addition to securing said note for four thousand dollars, above referred to, said mortgage was given by said defendants, Peter Mullen and Mamie Mullen, and each of them, to secure such further advances as might be made to said defendants, Peter Mullen and Mamie Mullen, or either of them, by plaintiff before the satisfaction of said mortgage, and which said further advances said Peter Mullen and Mamie Mullen, and each of them, in and by the terms of said mortgage agreed to pay to plaintiff, in gold coin of the United States; that said mortgage was also given to secure the fulfillment of any covenants or agreements which said Peter Mullen and Mamie Mullen, their heirs or assigns, might thereafter agree in writing with the plaintiff should be secured thereby, and also to secure the fulfillment of each and all the covenants and agreements in said mortgage contained."

[2] We are of the opinion that the construction contended for by respondent and adopted by the trial court is the correct interpretation of the clause above referred to, and that the necessity of an agreement in writing is limited to "any covenants or agreements," and does not apply to the "further advances" designated in the first part of the clause referred to. It follows that the trial court did not err in decreeing that the amount of the disputed advance, with interest and costs, constituted a lien upon the real property described in the mortgage and ordering a foreclosure thereof.

We have examined the other contentions of appellants as to attorneys' fees and costs, and do not find any error in the action of the trial court with regard thereto.

The judgment appealed from is affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the Supreme Court on May 5, 1919.

All the Justices concurred.

[Civ. No. 2725. First Appellate District, Division Two.—March 7, 1919.]

SIMON J. MONTZ, Respondent, v. E. S. NEVINS, Appellant.

- [1] **MALICIOUS PROSECUTION—DEFENSE—ADVICE OF COUNSEL—ERRONEOUS EXCLUSION OF EVIDENCE.**—In an action for malicious prosecution, the court erred in not permitting the defendant to prove that material facts were communicated to his counsel despite the fact that some of the facts and circumstances may have been communicated a month or two earlier than the date on which the arrest was advised.
- [2] **ID.—PROBABLE CAUSE—MIXED QUESTION OF LAW AND FACT.**—Probable cause is to be determined by the court when the facts are uncontroverted; but when the evidence is conflicting as to any of the facts, the existence of the facts in dispute is to be found by the jury, and the question whether the facts found by the jury establish probable cause is to be decided by the court.
- [3] **ID.**—In an action for malicious prosecution, the defense of advice of counsel goes to the question of probable cause and must be considered in determining that matter.

APPEAL from a judgment of the Superior Court of Fresno County. George E. Church, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Irvine P. Aten, J. G. Devaul, Everts & Ewing and M. H. Gallaher for Appellant.

C. K. Bonestell and Kitt Gould for Respondent.

LANGDON, P. J.—This is an appeal from a judgment for the plaintiff for one thousand dollars in an action for damages for malicious prosecution, pursuant to a verdict of a jury. The facts of the case are briefly as follows:

The plaintiff and the defendant were negotiating for an exchange of lands and upon August 28, 1913, agreed upon the terms of exchange which were set forth in contracts of that date. Plaintiff was in possession of certain lots under contract of purchase, and the defendant owned other lands in the vicinity. After entering into possession, the plaintiff placed a small frame building on the lots he had contracted to purchase, the house being rested upon small cement blocks. Under the bargain for exchange of lands, the defendant was to deed to the plaintiff ten acres of land, and the plaintiff was to execute a mortgage upon these ten acres to secure the payment of certain moneys to the defendant, and was to convey to defendant his equity in the lots, together with the house thereon. After signing the contracts plaintiff learned that under the government survey there was a reservation of a right of way for a road along each section line, and that this reservation as applied to the ten acres would subject them to an easement over what amounted to about one acre. He demanded that the defendant deed to him another acre somewhere in the neighborhood as a condition of carrying out the bargain for the exchange.

Defendant consulted counsel and under his advice on November 10, 1914, tendered to the plaintiff a deed to the ten acres demanding of the plaintiff the execution of the mortgage and the conveyance of the lots, of which the plaintiff was then in possession. The plaintiff refused to act, and the matter on November 10, 1914, was left in an unsettled condition. Plaintiff later made application to Elizabeth Stanford, one of the record owners of the lots occupied by him, for an extension of time within which to pay overdue installments. On November 30, 1914, he received a letter from said Elizabeth Stanford in response to his request, granting such extension to January 17, 1915. Defendant on December 3d procured a deed from Elizabeth Stanford to the same lots, which deed contained the following clause:

“This conveyance is received by the grantee herein with full knowledge of a certain contract relating to said lots made on the 17th of January, 1913, between Samuel R. Elliott and

Lottie M. Elliott. Elizabeth Stanford, first parties and Simon J. Montz as second party, and the grantee accepts this conveyance with knowledge of all the rights of said S. J. Montz arising by reason of said contract."

On December 9, 1914, defendant wrote to plaintiff that he had a deed to the lots and that plaintiff's rights were forfeited. On Saturday, December 12, 1914, defendant learned that the plaintiff had jacked up and was preparing to move into the county road the small house. Defendant again consulted his attorney, who was the assistant district attorney of Fresno County, and was told by him that if the house was of sufficient value, its removal would constitute grand larceny, and if it was removed to swear out a warrant for the plaintiff's arrest. This advice was given on Saturday and the defendant applied Saturday night to a justice of the peace for a warrant, stating the facts to him. The justice refused to issue a warrant to the plaintiff on the ground that at that time no crime had been committed and suggested to the defendant that he might procure an injunction. Defendant stated that it was too late. Sunday, defendant found the plaintiff with a group of men in the act of removing the house. There was a wordy altercation in which, among other things, the defendant stated that he would hold all the men engaged in the activities responsible if the house were removed. Montz at that time told Nevins that he had a right to move the house, that it belonged to him, and that the matter was none of Nevins' business. On Monday, acting under the advice of the assistant district attorney, the defendant swore to a warrant before another justice of the peace, charging plaintiff with grand larceny. Plaintiff was held to answer before the superior court and subsequently, on the motion of the district attorney, the charge was dismissed. Later plaintiff brought this action for malicious prosecution, in which judgment was rendered for the plaintiff for one thousand dollars, from which judgment defendant appeals. The foregoing facts are admitted.

Appellant objects to certain rulings of the trial court upon evidence, and to certain instructions and contends, first, that the court erred in granting plaintiff's motion to strike out the testimony of the witness Gallaher to the effect that in October, 1914, Mr. Nevins, the defendant, called at the office of the said Gallaher, who was his attorney, for private legal

counsel as to certain contracts between himself and the plaintiff and was advised by the attorney that he could not advise him as to the matter unless he saw the contracts and after seeing the contracts he would probably be able to advise the defendant. The plaintiff objected to this testimony on the ground that the only question before the court and before the jury was what was the conversation between the attorney and Mr. Nevins when Mr. Nevins went there to obtain the filing of the criminal complaint. The argument is made by appellant that Mr. Gallaher was the attorney for Mr. Nevins in all transactions with the plaintiff concerning this land, and that he became familiar with the facts and circumstances in regard to the relations of the parties through a period of two or three months' time; and that defendant should have been allowed to show as a part of his affirmative defense that all the facts concerning the entire matter were known to his attorney, whether these facts were communicated at the time of the arrest or at an earlier date.

We believe that appellant's position is well taken.

In the case of *Brown v. Smith*, 83 Ill. 291, it was held that one who procured the arrest of his divorced wife and her sisters on a charge of malicious mischief, and breaking into his house, which the wife refused to leave after the divorce, is not precluded from setting up the defense of advice of counsel on the ground of failure to disclose the facts, because he did not state to counsel the relations existing between himself and wife as to occupancy of the premises, where the counsel had represented him in the divorce suit and knew the facts. To the same effect is the case of *Dennis v. Ryan*, 65 N. Y. 385, [22 Am. Rep. 635]; *Peterson v. Toner*, 80 Mich. 350, [45 N. W. 346]. While no case in this state has been cited to us deciding this particular question, we find the following statement in the case of *Dawson v. Schloss*, 93 Cal. 194, [29 Pac. 31]: "In an action for malicious prosecution upon a criminal charge, in order that the defendant may escape responsibility for the prosecution upon the ground that he acted in good faith upon the advice of counsel that there was probable cause for believing the plaintiff guilty of the crime charged, he must prove that before receiving the advice he fairly and fully stated to his counsel, or at least that his counsel knew, all the facts within defendant's knowledge. . . ."

[1] Under these decisions, and under the logic of the situation, we are of the opinion the court erred in not permitting the defendant to proceed with his proof that the material facts were communicated to counsel by the defendant, despite the fact that some of the facts and circumstances may have been communicated a month or two earlier than the date on which the arrest was advised. Naturally, if a man is dealing with his attorney in regard to a particular transaction, and his attorney knows the facts in connection with such transaction—when the situation later changes in regard to some important matter, the client will merely narrate the new facts. It would be unnatural and wasteful of time and energy for him to begin at the beginning, and repeat in detail the facts already communicated by him, or otherwise known to his attorney. It is in the usual course of business under such circumstances for a man merely to advise his attorney of the additional facts relating to the subject matter and assume that the earlier facts are present in the mind of the attorney. In this case such an assumption was warranted, according to the testimony of the attorney himself.

As all evidence regarding information given to counsel prior to the time that the arrest was advised was stricken out, and as the jury was later instructed that matters stricken out were not to be considered by them in reaching their verdict, the jury must have disregarded, under this ruling and instruction, all disclosures made by defendant to his counsel at any period except at the time of the arrest. As the question of whether or not the defendant had made a full and fair disclosure of all material facts to his attorney was one of the decisive questions before the jury, we think this error was clearly prejudicial to the defendant.

[2] The appellant presents another question in his objections to a certain instruction to the jury. The court instructed the jury that there was a want of probable cause. The rule is that probable cause is to be determined by the court when the facts are uncontroverted. (*Potter v. Seale*, 8 Cal. 220; *Ball v. Rawles*, 93 Cal. 222, [27 Am. St. Rep. 174, 28 Pac. 937].) But when the evidence is conflicting as to any of the facts, the existence of the facts in dispute is to be found by the jury, and the question whether the facts found by the jury establish probable cause is to be decided by the

court. (*Sandell v. Sherman*, 107 Cal. 391, 394, [40 Pac. 493]; *Booraem v. Potter Hotel Co.*, 154 Cal. 99, [97 Pac. 65].)

[3] While there are different rules followed in other jurisdictions (note to *Van Mater v. Bass*, 18 L. R. A. (N. S.) 51), in California, by the weight of authority, the rule is that the defense of advice of counsel goes to the question of probable cause, and must be considered in determining that matter. (*Potter v. Seale*, 8 Cal. 220; *Levy v. Brannan*, 39 Cal. 485; *Dunlap v. New Zealand etc. Co.*, 109 Cal. 365, [42 Pac. 29].) The defense of advice of counsel has several elements, such as full and fair disclosure to counsel, good faith in acting upon the advice given, etc. On some of these elements, the evidence in the present case was conflicting. It was proper, therefore, for the jury to have found whether or not the defense of advice of counsel was established before the court determined the question of probable cause; and the court should have instructed them that if from the evidence they find that Nevins in good faith acted on the advice of counsel after a full and fair disclosure of the facts, there was probable cause; but if, on the other hand, they should find from the evidence the fact that Nevins did not in good faith and after a full and fair disclosure of the facts act upon the advice of counsel, that there was a want of probable cause.

The instruction given by the court has removed from the consideration of the jury the facts making up the affirmative defense of advice of counsel, in their relation to the question of probable cause. It is not necessary for us to go into a close analysis and comparison of the results of different instructions given under divergent theories of this defense prevailing in different jurisdictions, in order to decide whether this error was prejudicial or not under the special facts of this case. The first error considered here was sufficiently prejudicial. we think, to make it necessary to send the case back for a new trial, and the error in the instruction is discussed here so that it may not recur at the new trial.

Since the case will have to go back for a new trial and the same rulings upon evidence are unlikely to occur again, it becomes unnecessary for us to discuss the other objections of the appellant.

The judgment is reversed.

Haven, J., and Brittain, J., concurred.

[Civ. No. 1850. Third Appellate District.—March 7, 1919.]

E. H. ROTH, Appellant, v. MARY C. THOMSON, as Executrix, etc., Respondent.

- [1] **BROKERS — COMMISSIONS ON SALE OF REAL ESTATE — PROCURING CAUSE—FINDING FOR DEFENDANT SUPPORTED BY EVIDENCE.**—In this action by a real estate broker for commissions on the sale of a ranch, the evidence supported a finding that the sale was not made through any effort of the plaintiff.
- [2] **ID.—SALE BETWEEN PURCHASER AND VENDORS.**—The mere listing of the property by the brokers and sending purchasers letters describing it among other properties for sale, without calling particular attention to it, did not make the brokers the procuring cause of the sale where the purchasers had been trying to buy the property for a period of eleven years without arriving at an agreement, and finally bought it directly from the owners after the latter had reduced the price slightly.
- [3] **ID.—RULE AS TO BROKER'S RIGHT TO COMMISSION.**—To entitle a broker to commission for the sale of real estate, which he has been given by the owner authority to sell, he must produce before the owner a purchaser ready, willing, and able to purchase at the price and on the terms specifically expressed in the contract of employment.
- [4] **ID.—CHANGE BY OWNER IN TERMS OF SALE.**—A change made by the owner in the terms of sale when consummating the sale cannot impair the right of the broker to his commission.
- [5] **ID.—BROKER AS PROCURING CAUSE.**—In order to recover commissions, the broker must be the "procuring" cause and not one in a chain of causes of the sale.
- [6] **ID.—NO EXCLUSIVE CONTRACT.**—Where a broker had written to the owner asking if his ranch was still for sale and if there had been any change in the price, and the owner replied, setting a price and mentioning the commission he was willing to pay, the owner still had the right to sell independently of the broker, since there was no exclusive right to sell and no time fixed within which the sale might be made.
- [7] **ID.—EVIDENCE—HEARSAY.**—In a broker's action for commission on sale of a ranch a statement by one of the owners that the broker had nothing to do with the sale was clearly hearsay and self-serving, and an objection to the testimony should have been sustained.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles Kasch and W. G. Poage for Appellant.

Preston & Preston for Respondent.

HART, J.—The action was brought to recover from one Henry T. Thomson a real estate broker's commission alleged to have been earned by plaintiff in procuring purchasers of certain lands of said Thomson. Subsequently to the filing of the complaint, Henry T. Thomson died, his wife, Mary C. Thomson, was duly appointed and qualified as executrix of his will, and plaintiff filed a supplemental complaint making her, as such executrix, the party defendant. The supplemental complaint set up the due presentation to the executrix and the rejection by her of a claim for \$968 as commissions for plaintiff's alleged services and prayed judgment for that amount.

The cause was tried before the court sitting without a jury and judgment was rendered in favor of defendant. From said judgment plaintiff prosecutes the appeal.

It is agreed by both parties that there are two questions to be decided, namely: Was there a sufficient contract of employment and agreement to pay a commission, signed by Henry T. Thomson? If so, did plaintiff produce a purchaser ready, willing, and able to purchase the property from said Thomson under the terms and conditions of said contract of employment?

The court found that, on the twenty-sixth day of February, 1917, Henry T. Thomson was the owner of about 1,940 acres of land in Mendocino County and of a large amount of personal property, consisting of cattle, horses, and hogs; that, on or about said date, said Thomson, without the aid or assistance of plaintiff, found purchasers for said ranch and personal property in the persons of C. E. Firebaugh and J. W. Firebaugh; that C. E. Firebaugh entered into a contract with said Thomson, agreeing to purchase said property for twenty-three thousand five hundred dollars, payable as follows: One thousand dollars on the execution of said agreement; eight thousand dollars upon the execution and delivery of a good and sufficient warranty deed conveying the lands of said Thomson and a bill of sale for the personal property; the balance of fourteen thousand five hundred dollars to be

represented by a promissory note payable on or before six years from date of delivery of deed, with six per cent interest per annum, secured by mortgage upon the property transferred; that said Firebaughs thereafter completed the purchase of said ranch from deceased; that plaintiff did not procure said purchasers for said property nor did he act as agent for deceased in the sale thereof; that he did not bring the parties together and did not induce the said Firebaughs to enter into said contract; that he rendered no valuable or other service to deceased in procuring said purchasers and is not entitled to any commission.

The contract of employment relied upon by plaintiff consists of a number of letters passing between him and Henry T. Thomson, plaintiff residing at Willits, and said Thomson at Covelo, in Mendocino County. The first letter, written by plaintiff, was dated August 19, 1915, in which it was stated: "I am writing to find out if your ranch is still in the market. . . . I had a gentleman in my office who wants a good stock ranch. . . . I told him about your ranch, and he promised to go up and see it within the next two weeks. His name is V. A. Spragia, so if he comes and you do business you will do the right thing by me. Would be pleased to hear from you as to any changes in price or otherwise." Thomson replied to this letter on the next day, August 20th, as follows: "My ranch is on the market for \$26,000.00. 1840 acres of land and all of the stock. . . . Your commission will be 5% on the land. Will not pay any commission on sale of stock." On August 23d plaintiff wrote asking Thomson to segregate the land and the stock, giving the price on each. On August 25th Thomson wrote that the price of the land was ten dollars per acre and that the stock was not for sale if he did not get a buyer for the land. On April 17, 1916, Thomson again wrote plaintiff, giving an itemized list of his livestock, farming implements, etc., and the value of each, and stated: "I will take \$26,000.00 for this property. Pay you 5 per cent com. on sale of land. \$15,000.00, balance \$11,000.00 at 6%."

We are satisfied that the finding that the sale of the Thomson ranch to the Firebaughs was not effected through any effort of the plaintiff derives sufficient support from the evidence, hence it will not be necessary to consider whether the plaintiff's purported authority to negotiate the sale of the

ranch measured up to the requirements of our statute of frauds, or, to be more definite, comes fairly within the provisions of section 1624, subdivision 6, of the Civil Code. (See, also, Code Civ. Proc., sec. 1973, subd. 6.)

The facts, as briefly as they may well be stated, are these: In 1906 J. W. Firebaugh met Mr. and Mrs. Thomson on the Thomson ranch and purchased from them a number of horses, and there were then some negotiations between the parties regarding the purchase of the ranch by Firebaugh. In 1911 the Firebaugh brothers again met the Thomsons at their ranch, remained there three days and attempted to buy the property, but could not come to an agreement. The Firebaughs lived in Fallon, Nevada, and, after returning to their home, a number of letters passed between them and Thomson, none of which appears in the record, relative to the purchase of the ranch and stock. Mrs. Thomson testified that the correspondence with the Firebaugh brothers relative to the proposed purchase of the ranch thereafter continued, intermittently, for a period of two years and ceased either in the year 1913 or 1914. Asked if she at that time had given up selling the place to them, she replied: "Well, I should say so."

After the receipt of the letter from Thomson, dated August 25, 1915, heretofore referred to, plaintiff went to the Thomson ranch and secured five or six photographs of the place, in one of which Mrs. Thomson appeared. He placed an "ad" in one of the San Francisco daily papers, advertising different properties for sale. J. W. Firebaugh saw this ad and, on December 18, 1915, wrote plaintiff requesting him to send a list of properties he had for sale in Mendocino County, which plaintiff did. Firebaugh replied requesting detailed information as to certain properties, which plaintiff furnished him. On December 31, 1915, Firebaugh wrote plaintiff asking for further information and stated: "The place you speak of at Covelo answers the description of a place I looked at once. East of Round Valley on the road to the Sacramento Valley. Owned at that time by a Mr. Thomson." Plaintiff sent the photographs he had of the Thomson ranch to Firebaugh, who recognized the place and also Mrs. Thomson in one of the pictures.

In 1916 the Firebaughs again visited the Thomson ranch and, in February, 1917, they purchased the property. J. W.

Firebaugh testified that when going to the ranch at this time they did not stop to see plaintiff and said that he had never met him prior to the consummation of the sale. It does not, in fact, appear that the Firebaughs ever communicated with or heard from the plaintiff after January 20, 1916.

Testifying as to the circumstance of the appearance of the Firebaughs at the ranch in the summer of 1916, Mrs. Thomson said that they (the Firebaughs) were at that time "passing through the country" on a camping tour and stopped at a "ranger's station" where a Mr. John Bauer was stationed. The Firebaughs remained in that locality for seven days, during which time they renewed negotiations with the Thomsons for the purchase of the ranch. They rode over the ranch and examined it and the stock carefully, being accompanied on one occasion by Mr. Thomson himself and on others by someone sent out by Thomson. She testified that they at that time almost came to an agreement for the sale of the ranch and stock to the Firebaughs, but the latter were not satisfied with the price asked for the properties. Without then consummating the purchase, the Firebaughs proceeded to Covelo and thence to Napa. The Thomsons had asked twenty-four thousand dollars for the ranch, the equipments and the stock thereon, and gave the Firebaughs ten days within which to decide whether they would take the properties at that sum. Later the Firebaughs addressed to the Thomsons a letter in which they offered them twenty-one thousand dollars for the properties. Mrs. Thomson said that, immediately on reading that letter, she destroyed it. The next time the Thomsons heard from the Firebaughs relative to the purchase of the ranch was in February, 1917, when the Mr. Bauer, above mentioned, having received a letter from the Firebaughs, requesting him to see the Thomsons and ascertain from them the lowest price they would take for the properties, went to the home of the Thomsons and read to them the letter. The Thomsons told Bauer that they still wanted and would require twenty-four thousand dollars for the ranch and stock, etc. A few days thereafter J. W. Firebaugh visited the Thomsons and said he desired to look over the stock on the ranch, to see how they had "wintered and count them up and see what we had." Mr. Thomson sent a man with said Firebaugh over the ranch to look over and take an account of the number of head of the different kinds of stock owned by the Thomsons

and then on the ranch. Again, on this occasion, the said Firebaugh was told by the Thomsons that they demanded and wanted twenty-four thousand dollars for the ranch as it then stood and the stock. Firebaugh said he would give them an answer within a few days. On the seventeenth day of February, 1917, the said J. W. Firebaugh sent a telegram to Mr. Thomson, dated at Napa, in which he offered to give Thomson twenty-three thousand five hundred dollars for the properties, "providing the Forest Service will give us the same range now allowed you. If that suits you, meet me at Ukiah." (Here it may be explained that the Forest Service of the United States had rented a large tract of government range land adjacent to that of the Thomsons to the latter at a nominal rental.) After considering this proposition, the Thomsons concluded to accept it and thereupon telegraphed the Firebaughs to meet them at Ukiah on February 22, 1917. The Firebaughs and the Thomsons met at Ukiah on February 25, 1917, and then and there immediately entered into negotiations, which, as stated above, culminated in the sale of the properties to the Firebaughs.

It is not at all doubtful that, from the foregoing evidential facts, the trial court could justly have specifically found, as impliedly in general language it did find, that the Firebaughs, for a period of approximately eleven years, dating from the year 1906—long before the latter had ever had any communication with the plaintiff regarding the ranch—had been trying to purchase that particular property; that their minds were and had been for many years particularly fixed upon buying the Thomson ranch; that, after having attempted but failed a number of times to consummate a deal with the Thomsons, the advertisement of the plaintiff in one of the San Francisco newspapers, setting forth that he had for sale several different tracts of land in Mendocino County, came under their observation, and that, being desirous of securing good stock land in Mendocino County, they communicated with the plaintiff for the purpose of securing from him further particulars or more definite information than the advertisement disclosed of the properties he had for sale; that, upon receiving a reply to their letter from plaintiff, the Firebaughs found that the Thomson ranch, which they had for many years been endeavoring to buy, was among the properties which the former referred to in his advertisement;

that, without further communication or dealings with the plaintiff, the Firebaughs, about a year subsequently, again went to the Thomson ranch and again opened up negotiations with the Thomsons themselves for the purchase of the ranch, and finally made a deal with them and bought their ranch at a price several thousand dollars below that which they authorized the plaintiff to sell it for in the letter to him of August 19, 1915.

[1] It is to our minds perfectly clear that from such findings, which, as before stated, were impliedly made by the court in this case, the conclusion is irresistible that the plaintiff's efforts were not the procuring or efficient cause of the sale of the ranch to the Firebaughs. [2] It was not as the result of his efforts that the minds of the vendors and vendees were brought together upon the proposition. He did not even put the Firebaughs "on the track" of the property, for they themselves had for a long time previously to any communication with the plaintiff been "on the track" of the property, and for a corresponding period of time had perseveringly endeavored to purchase it at a price agreeable to their own conception or estimate of what it was worth. There is no evidence that the plaintiff ever informed the Thomsons that he had in the Firebaughs prospective buyers of their ranch, and Mrs. Thomson testified that, when the negotiations directly resulting in the sale were pending, they asked J. W. Firebaugh, who at that time was conducting the negotiations on behalf of himself and brother, whether there was any real estate agent or broker concerned in the transaction in any way, and he replied in the negative. In a word, the plaintiff did not produce the Firebaughs before the Thomsons as a purchaser ready, able, and willing to buy the ranch upon the terms and at the price fixed by the Thomsons in their letter to the plaintiff purporting to authorize him to sell the property. As far as the evidence shows the plaintiff had gone in an effort to sell the property to the Firebaughs was in writing the latter letters describing among other properties he had for sale in Mendocino County the ranch of the Thomsons. He, indeed, did not direct the attention of the Firebaughs particularly to said ranch until after the latter had, in a letter addressed to him, inquired whether the tract referred to in a letter to the Firebaughs from him as "stock ranch 1840A" was the Thomson ranch. In reply to that in-

quiry he gave the Firebaughs in a letter some particulars as to the character of said ranch; but he thereafter did absolutely nothing to bring about the sale. This sale, as seen, was effected only after considerable negotiations between the Firebaughs and Thomson and after the latter had reduced the price in a small amount.

[3] The rule is that to entitle a broker to a commission for the sale of real estate which he has been given by the owner authority to sell, he must produce before the owner a purchaser ready, willing, and able to purchase at the price and on the terms specifically expressed in the contract of employment. [4] While a change made by the owner, when consummating the sale, in the price of the land or the terms of the sale from those specified in the broker's contract cannot of itself affect or impair in any way the right of the broker to his commission, the latter cannot claim a commission unless his efforts are the procuring or inducing cause of the sale. This proposition is explained with singular lucidity in *Smith v. Preiss*, 117 Minn. 392, [Ann. Cas. 1913D, 820, 136 N. W. 7], as follows: [5] "In order for the broker to recover, the evidence must show that his efforts were the procuring cause and not merely one in a chain of causes. The expression 'procuring and inducing cause,' as used in the books, refers to the cause originating from a series of events that without break in their continuity results in the prime object of the employment of the agent."

The books are full of cases expounding and applying the rules governing in cases of this character, and it is sufficient merely to cite a few which are particularly applicable to the facts of the case now in hand, viz.: *Zeimer v. Antisell*, 75 Cal. 509, [17 Pac. 642]; *Gunn v. Bank of California*, 99 Cal. 349, [33 Pac. 1105]; *Cone v. Keil*, 18 Cal. App. 675, [124 Pac. 548]; *Dreyfus v. Richardson*, 20 Cal. App. 800, [130 Pac. 161]; *Brown v. Mason*, 155 Cal. 155, 159, [90 Pac. 867].

[6] Of course, it will not be contended that the Thomsons did not have the right to sell the property independently of any arrangements or agreement they had with the plaintiff. The brokerage agreement in this case, assuming that it is legally sufficient as such in all respects, cannot be construed as vesting in the plaintiff the exclusive right to sell the property. Indeed, it does not even go so far as to make him the exclusive agent for that purpose, nor does it specify any time

during which his authority to sell should exist. Conceding it to be sufficient to have authorized him to sell the property, it is so phrased that the Thomsons were at liberty to terminate it at any time before he procured a purchaser able, willing and ready to purchase on the terms stated therein. But, however this may be, it is clear, as stated, that the Thomsons had the right to sell the ranch without the assistance or intervention of the plaintiff and that the finding that they did so is, as above declared, well supported.

[7] The only other point urged for a reversal involves certain rulings whereby certain witnesses were permitted, over objection by the plaintiff, to testify that, in conversations with Henry T. Thomson, just prior to his death and shortly after the sale was effected and after the plaintiff had started this action, the said Thomson declared that the plaintiff had had nothing to do with the sale of the ranch. It is claimed that this testimony was highly prejudicial to the substantial rights of the plaintiff.

The testimony is clearly hearsay and self-serving, and the objection to it should have been sustained. We are not prepared, though, to say that it resulted or could, under the circumstances of the case, have resulted in substantial or, indeed, any damage to the plaintiff's rights in the trial of the case. The cause was tried by the court, and it is to be assumed that the court, in reaching its conclusion, disregarded any incompetent testimony which might have found its way into the record. But, beyond this consideration, there is, as has been shown, other testimony in the record which of itself is amply sufficient to support the decision. Indeed (we do not hesitate to say) the objectionable evidence referred to may be and could have been by the trial court utterly disregarded and still, the verity of the other evidence having been established by its acceptance by the trial court, no other decision than that crystallized in the findings, so far as is concerned the issue as to whether it was directly or otherwise through plaintiff's efforts that the ranch was sold to the Firebaughs, could justly have been warranted. We, therefore, conclude that the error complained of cannot be held to have resulted in a miscarriage of justice. (Const., art. VI, sec. 4½.)

The judgment is affirmed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 2661. First Appellate District, Division One.—March 8, 1919.]

ALICE SMITH, Respondent, v. M. H. HERNAN et al,
Defendants; LILLIE B. HERNAN, Appellant.

- [1] **MORTGAGES — COMMUNITY PROPERTY — SECURITY FOR HUSBAND'S DEBT—SUBSEQUENT CONVEYANCE TO WIFE—NEW MORTGAGE—CONSIDERATION.**—Where a husband mortgaged community property as security for his individual indebtedness, and thereafter conveyed the property to his wife, and after his debt had been extended from time to time and he had made several payments by which the debt had been reduced, the wife joined him in the execution of a new mortgage on the property to secure his promissory note for the amount then remaining unpaid, the original indebtedness and the various extensions of time granted the husband in which to pay the same furnished a valuable consideration to him for the note and mortgage.
- [2] **ID.—WIFE'S LIABILITY—SURETYSHIP.**—The debt in such case not being that of the wife, and the property being her separate property, she stands as surety for the payment of the debt.
- [3] **FORECLOSURE—EXPENSE OF SEARCH OF TITLE.**—On the foreclosure of such a mortgage, there being no provision in the instrument securing the expense of a search of title prior to foreclosure proceedings, the allowance in the judgment of twenty-five dollars for such expense was erroneous, and the judgment should be modified accordingly.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. **Bernard J. Flood, Judge.** Modified and affirmed.

The facts are stated in the opinion of the court.

J. Early Craig for Appellant.

Gerald C. Halsey and C. Harold Caulfield for Respondent.

WASTE, P. J.—This is an appeal by the defendant **Lillie B. Hernan** from a decree foreclosing a mortgage. The original indebtedness was contracted by defendant **M. H. Hernan** and secured by a mortgage of community property executed by him alone. Subsequently said **Hernan** deeded the property to **Lillie B. Hernan**, who was and is his wife. The indebtedness being extended from time to time was reduced to \$1,175, and defendant **M. H. Hernan** executed to plaintiff his

promissory note for that amount, to secure which both defendants executed and delivered to plaintiff a mortgage of the same property described in the original mortgage and in the deed from M. H. Hernan to his wife, and then separately owned by her.

The note was not paid when it became due and this action was instituted, resulting in the decree complained of by appellant.

[1] Appellant attacks the finding of the court that the "mortgage was made, executed, and delivered by defendants M. H. Hernan and Lillie B. Hernan, his wife, to plaintiff on the fifth day of December, 1913, at the time of the execution and delivery of the promissory note [executed by defendant M. H. Hernan alone] described in plaintiff's complaint, and as part of the same transaction, and for the purpose of securing the payment of said promissory note according to the terms thereof." This finding was made in response to the issues squarely presented by the pleadings, particularly the denials and affirmative allegations of appellant's answer, and is strictly in accord with the testimony of all the witnesses for both plaintiff and defendants. It will, therefore, not be disturbed.

The original indebtedness and the various extensions of time granted defendant in which to pay the same furnished a valuable consideration to defendant M. H. Hernan for the note and mortgage. (*Humboldt Sav. etc. Society v. Dowd*, 137 Cal. 408, 412, [70 Pac. 274]; *Whelan v. Swain*, 132 Cal. 389, 391, [64 Pac. 560].) As the consideration was sufficient to support the promise of the husband upon the new note it was sufficient to support the mortgage given by the wife contemporaneously with the execution of the note. [2] The debt not being her own, and the property being her separate property, she stands as surety for the husband for the payment of the debt. (*McDonald v. Randall*, 139 Cal. 246, [72 Pac. 997]; *Burkle v. Levy*, 70 Cal. 250, [11 Pac. 643]; *Rohrbacker v. Aitken*, 145 Cal. 489, [78 Pac. 1054]; *Farmers and Merchants' Bank v. De Shorb*, 137 Cal. 693, [70 Pac. 771].)

[3] On the trial of the case, counsel for plaintiff and the court were of the opinion that the mortgage provided for and by its terms secured the expense of a search of title prior to

foreclosure proceedings. There is no such provision in the mortgage.

The court below is directed to modify the judgment by deducting therefrom the item of twenty-five dollars allowed for search of title, and as so modified the judgment will stand affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 7, 1919.

[Civ. No. 2664. First Appellate District, Division One.—March 10, 1919.]

COSTANZO CELIANO et al., Appellants, v. GIUSEPPE GIORDANENGO, Respondent.

- [1] **JUDGMENTS—ACTION TO SET ASIDE—DEFECTIVE PROOF OF SERVICE—EQUITY.**—A bill in equity to set aside a judgment upon the ground that proof of service of summons in the action in which such judgment was obtained failed to show that it was served upon each of the plaintiffs (the defendants in the prior action), must show that the plaintiffs were not in fact served with summons as required by section 410 of the Code of Civil Procedure, and that they, as defendants in said prior action, have a good defense on the merits thereof.
- [2] **SUMMONS—DEFECTIVE RETURN—EQUITY.**—A defective return of process duly served is not sufficient ground for equity to interfere.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Bernard J. Flood, Judge. Affirmed.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto for Appellants.

John J. Mazza for Respondent.

KERRIGAN, J.—This is an appeal from a judgment entered upon an order sustaining a general demurrer to plaintiffs' complaint.

The plaintiffs herein were the defendants in a justice's court action, and bring this suit in equity for the purpose of setting aside the judgment obtained against them therein, basing their right to this relief upon the ground that the proof of service of summons in said action fails to show that it was served upon each of them as defendants therein.

[1] Whatever merit there may be in this point as an abstract proposition of law it can avail the plaintiffs nothing in this proceeding, for two reasons: (1) That the complaint fails to allege that the defendants in the former suit were not in fact served with summons as required by section 410 of the Code of Civil Procedure, and (2) that they, as defendants in said justice's court action, had a good defense on the merits thereof.

[2] A defective return of process duly served is not sufficient ground for equity to interfere. (*Pico v. Sunol*, 6 Cal. 294; *Eichhoff v. Eichhoff*, 107 Cal. 42, [48 Am. St. Rep. 110, 40 Pac. 24]; 23 Cyc. 996.) And it is the established law in this state that a bill of equity must allege and show that the complainant has a good and meritorious defense to the action at law. (*Burbridge v. Rauer*, 146 Cal. 21, [79 Pac. 526]; *Bell v. Thompson*, 147 Cal. 689, [82 Pac. 327]; *Matson v. John Batto & Sons*, 173 Cal. 800, [161 Pac. 1144]. See, also, *Freeman on Judgments*, sec. 498; 23 Cyc. 1031.)

Under these authorities it must be held that the equitable relief of setting aside a judgment obtained in a court of law will not be granted without an affirmative showing in the complaint that the complainant, as defendant in said action, has a good defense on the merits. It should have been made to appear in the complaint in this proceeding that a like judgment would in all probability not result from a new prosecution of the action at law.

The judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 2546. First Appellate District, Division One.—March 10, 1919.]

GEORGE K. FORD, Plaintiff and Appellant, v. **FRANK FREEMAN et al.**, Respondents; **WILLIAM M. CANNON**, Defendant and Appellant.

[1] **APPEAL—MATTERS REVIEWABLE ON APPEAL FROM JUDGMENT.**—Where judgment was entered on June 12, 1911, notices of intention to move for new trial filed September 8th and 11th thereafter, and notices of appeal filed December 7th and 8th following, the court on appeals from judgments could consider the insufficiency of the evidence to justify the findings and judgment of the trial court, though the order denying motions for new trial was not entered until after the amendments to sections 956 and 963 of the Code of Civil Procedure, taking away the right of appeal from orders denying motions for a new trial.

[2] **ATTORNEY AND CLIENT—CONTINGENT FEE—CONTRACTS BETWEEN ATTORNEYS—EVIDENCE.**—In this action between four attorneys involving their rights to share in a contingent fee, the undisputed evidence shows that the plaintiff, the cross-complainant and two defendants (four attorneys in all) were associated together for one client throughout a litigation and that each performed such services as were required of him.

[3] **ID.—ATTORNEYS ENGAGED IN SAME LITIGATION—OMISSION OF COURT TO FIND.**—Attorneys who jointly undertake to prosecute or defend a lawsuit are entitled, in the absence of an express agreement to the contrary, to share equally in the compensation, and it therefore follows that the trial court should have found, either that there was an express agreement between these four attorneys as to an equal division of the contingent fee or else the court should have found as a fact that there was no agreement whatever between them upon the subject of fees, in which case the court should have found as a legal result the existence of an implied agreement growing out of their common venture for an equal division of whatever their share in the recovery might be. In either event the defendants would not have been entitled to a judgment in their favor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge. Reversed.

The facts are stated in the opinion of the court.

Stanley Moore for Plaintiff and Appellant.

Joseph E. Reardon for Defendant and Appellant.

Garret W. McEnerney, of Counsel for Plaintiff and Appellant and Defendant and Appellant.

George B. Freeman and Frank H. Gould for Respondents.

RICHARDS, J.—These are two appeals from a judgment in favor of defendants, which, by stipulation of the parties, were printed in the same transcript and have been briefed and argued together.

[1] The judgment was entered June 12, 1911. The notice of appeal of the plaintiff Ford was filed December 7, 1911. The cross-complainant Cannon's notice of appeal was filed November 8, 1911. The plaintiff's notice of intention to move for a new trial was filed September 8, 1911, and that of the cross-complainant was filed September 11, 1911. The order denying both motions was entered December 4, 1916, after the amendment to section 963 of the Code of Civil Procedure, taking away the right of appeal from orders denying motions for a new trial, and also after the amendment of section 956 of the same code, providing that upon appeal from the judgment the court may review orders made on motion for a new trial. Upon this state of the record the respondents herein assert that this court cannot consider the point as to the insufficiency of the evidence to justify the findings and judgment of the trial court. There is no merit in this contention. (*Wilcox v. Hardisty*, 177 Cal. 752, [171 Pac. 947].)

In order for a proper determination of this cause it is necessary to give a brief review of the facts of this case, which are substantially undisputed. They are these: On April 10, 1901, one Samuel C. Pierce received serious personal injuries while in the employ of the Mountain Copper Company, in the mine of said company in Shasta County. In the month of January, 1902, Pierce employed the plaintiff herein, George K. Ford, an attorney having his offices in San Francisco, to institute an action against the Mountain Copper Company for damages arising out of his said injuries, upon a contingent fee of fifty per cent of the recovery, the agreement to this

effect being in writing. It was understood at the time that Mr. W. M. Abbott would be associated with Ford in said litigation. It was at first contemplated that the action would be commenced in Shasta County. Not long after the employment of Mr. Ford he, in the city of San Francisco, met the defendant, Frank Freeman, also an attorney, having his offices in Willows, Glenn County, and in a conversation there held told the latter that he had a case similar to one in which Freeman had been recently interested, and that he would like to associate Freeman with him in his case. Ford and Pierce differ as to which first suggested the employment of Freeman, but the difference is immaterial. In the early part of July, 1902, Mr. Abbott, who had already prepared certain tentative forms of complaint, wrote to Mr. Freeman stating the desire of Mr. Ford, Mr. Pierce, and himself to associate Mr. Freeman with Ford and himself in the case. A correspondence followed, in which Freeman expressed his willingness to come into the case, after which Pierce came into consultation with Freeman, who took his statement and the names of his witnesses, and also took steps looking to the preparation and filing of a complaint. Shortly thereafter Mr. Abbott, having undertaken certain other employments, withdrew from the case, and it would seem that Mr. Ford also had concluded to withdraw, leaving Pierce free to make such arrangements as he might see fit with Freeman as to its further conduct. There is some confusion in the evidence as to this matter, but at any rate not long thereafter, in the early part of September, 1902, Pierce and Freeman entered into a writing by which Freeman alone undertook to conduct Pierce's litigation for a contingent fee of one-half of the recovery. Thereafter and on September 20, 1902, Freeman requested Mr. Donahue, who shared offices with him in Willows, to be associated with him in the case. About the 1st of October, 1902, Donahue came down to San Francisco and met Mr. Ford in the office of Mr. Cannon there. Mr. Cannon had formerly been a partner of Mr. Freeman in the practice of the law, and the relations between himself and Mr. Freeman and Mr. Donahue were cordial. At the time of his visit to San Francisco Mr. Donahue had drafted and brought down with him a form of complaint for the institution of an action on Pierce's behalf in the federal court, and for that reason stated to Mr. Cannon that he and Mr. Freeman wished to associate him

in the case. Cannon assented to this, and they went over the complaint together and agreed it should be redrafted. This was done by Cannon, who testified that at the time the matter of Mr. Ford's connection with the case was discussed. At that time Ford and Cannon were not acquainted. Upon this occasion also Cannon states that the matter of the division of the fee was considered, and that Donahue then stated that the fee in case of a recovery was to be divided equally among the four attorneys. Whether or not this be taken as an undisputed fact is not very material, for the reason that, we think, the practically uncontradicted proofs show that not long thereafter a letter was written by Donahue to Ford to the effect that the fee in the event of recovery was to be divided equally among the four attorneys in the case. Mr. Donahue states that he does not remember having written such a letter, and the letter itself was destroyed in the great fire of 1906; but the number and clear recollection of the witnesses who testify to the existence and contents of this letter put the matter beyond dispute. The complaint when drafted by Mr. Cannon was signed by him with the names of the four attorneys, and in that form was filed on October 6, 1902. The case proceeded through the successive steps usual to the preparation and trial of a cause, and it cannot be questioned that during all of its stages the names of the four attorneys appeared as attorneys of record in the case, and that each and all of them knew that such was their, and each of their, ostensible relation to the case. The part which each took in the preparation and trial of the case was not equal. Mr. Ford, while frequently consulted and occasionally corresponded with by the defendants herein, did not actively take part in the trial. Mr. Cannon, on the other hand, took the leading part in the trial of the cause and the preparation and hearing upon appeal. As costs and expenses were required, each of these paid such expenses as the occasion required. Upon the trial the plaintiff Pierce recovered a judgment for fifteen thousand dollars, which judgment was affirmed upon appeal on February 25, 1905. On the day of the affirmation of the judgment, Mr. Freeman took from Mr. Pierce an assignment of it to himself, and thereafter and on August 30, 1905, received from the Mountain Copper Company the sum of fifteen thousand one hundred dollars in full satisfaction of the said judgment. One-half of this sum Freeman

delivered to the plaintiff Pierce. The other half was substantially divided between himself and Donahue. The cross-complainant Cannon herein having learned of the settlement of the suit, began inquiring as to his proportion of the fee. These inquiries, in the absence of Mr. Freeman in the east, resulted in the sending by Mr. Donahue of a check for \$750 to Mr. Cannon, which the latter received as upon account, still insisting upon his right to an equal one-fourth of the fee. Ford had received nothing, and had been out quite a sum in expenses, and being able to get no satisfaction commenced this action.

His complaint herein, after referring briefly to Pierce's injuries and cause of action, alleges an agreement between himself, Freeman, Donahue, and Cannon for an equal division of the contingent fee in event of a recovery, and that the contract which Pierce made with Freeman was made for the benefit of the four, and that whatever sum he had received thereunder he had received in trust to divide the same equally among the four; and that said Freeman had received the sum approximately of seven thousand five hundred dollars as such fee, and to be held as such trust, and that he and said Donahue had converted the same to their own use, and had failed and neglected to pay to the plaintiff herein his equal share of the same. He further averred that the defendants were insolvent, and hence prayed for a receivership to take charge of and properly disburse the said trust fund, and for general equitable relief. The defendants Freeman and Donahue appeared and answered this complaint, denying all of the material averments as to the interest and right of the plaintiff in or to any portion of the aforesaid fee. Mr. Cannon, who had been also made a defendant, appeared with a cross-complaint, setting forth substantially the same matters contained in the original complaint. The defendants also answered this cross-complaint with like denials.

Upon the trial of the cause the foregoing facts were established by practically undisputed proofs. The trial court made its findings and rendered its judgment in the defendants' favor. It found that while the plaintiff Ford had originally had an agreement with Pierce for the prosecution of his case upon a contingent fee of one-half of the recovery, this agreement had been abandoned and terminated by him prior to

the making of the Freeman contract; that the said contract between Freeman and Pierce had been entered into by Freeman alone and for his own use and benefit, and that neither the plaintiff Ford nor the cross-complainant Cannon were in any wise interested therein; that the said plaintiff Ford and cross-complainant Cannon did in fact perform services in the prosecution of the Pierce action subsequent to the execution of the Freeman contract, and that said Freeman had paid to said Cannon the sum of \$750, but had not paid to the plaintiff any sum whatever; that said Freeman had collected on account of the judgment obtained in said action the sum of \$15,170.80, and had delivered to said Pierce his due share of said sum, and that as to the portion thereof retained by him no trust existed in favor of either Ford or Cannon. As a conclusion of law from these findings of fact the court adjudged that the plaintiff and cross-complainant take nothing, and that the defendants Freeman and Donahue have judgment for their costs.

The appellants herein contend that the foregoing findings of the trial court are unsupported by the evidence, and that the judgment based thereon must be reversed.

[2] We agree with this contention. The undisputed evidence in this case shows that the plaintiff Ford, the defendants Freeman and Donahue, and the cross-complainant Cannon were associated together as attorneys of record for Pierce from the inception of his action against the Mountain Copper Company until the termination of said action through the settlement thereof by the defendant therein, after judgment for practically the whole amount of such judgment; that they each performed such services as such attorneys of record in said action as were required of them during the course thereof. The practically undisputed evidence also shows that prior to the inception of such action the defendant Donahue, purporting to act on behalf of both himself and his associate Freeman, had an understanding evidenced by a letter written by him, to the plaintiff Ford, the contents of which were fully and sufficiently proven, to the effect that these four attorneys were each to share equally in the contingent fee of one-half of the recovery in said action in the event that a recovery was had therein. If the defendant Donahue was acting with authority from his associate, Freeman, in thus creating this

understanding, then both defendants are bound by it, and the trial court should have found that such was the agreement. If, on the other hand, said Freeman, as the sole contracting attorney in the contract with Pierce, was not to be held bound by the understanding thus set forth by Donahue, then it undisputably follows that there was no agreement between these four lawyers as to the matter of fees; and if this be taken to be the fact, then it also undisputably follows that these four attorneys were joint adventurers in the conduct of a litigation for a common client, their and each of their fees being contingent upon the success of their mutual endeavors to obtain a recovery for their client in the case, none of them being entitled to any fees from each other or from the client in the absence of such recovery. Nowhere is there any hint in the case of any other understanding between these four attorneys, unless the understanding to precisely the same effect undertaken to be expressed by the Donahue letter is to be given effect. This being so, we think the rule declared in 6 Corpus Juris, section 334, should be given application to this case. Said rule is expressed as follows: [3] "Attorneys who jointly undertake to prosecute or defend a lawsuit are entitled, in the absence of an agreement to the contrary, to share equally in the compensation." The same rule in slightly different form is expressed in 2 Thornton on Attorneys, section 469, while the following cases fully sustain the rule: *Robarts v. Haley*, 65 Cal. 397, [4 Pac. 385]; *Gill v. Mayne* (Iowa), 162 N. W. 24; *Seneff v. Healy*, 155 Iowa, 82, [135 N. W. 27]; *Columbus v. Sheehy*, 43 App. Cas. (D. C.) 462.

If the foregoing views of the facts and the law of this case be correct, it follows that the trial court should have found either that there was an express agreement between these four attorneys as to an equal division of this contingent fee, or else the court should have found as a fact that there was no agreement whatever between them upon the subject of fees, in which case the court should have found as a legal result the existence of an implied agreement growing out of their common adventure for an equal division of whatever their share in the recovery might be. In either event the defendants would not have been entitled to a judgment in their favor. By reason of the failure of the trial court to make

a finding either way upon this vital issue in the case, the judgment must be reversed. It is so ordered.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 8, 1919.

Shaw, J., Lawlor, J., Melvin, J., Wilbur, J., and Lennon, J., concurred.

[Civ. No. 2953. Second Appellate District, Division One.—March 10, 1919.]

VAN R. KELSEY, Petitioner, v. JAMES C. BYERS, Sheriff of the County of San Diego, California, Respondent.

[1] WRIT OF MANDATE—EXECUTION.—Where the sheriff's return to an alternative writ of mandate requiring him to show cause why he should not execute a writ of execution issued out of a superior court is based upon a restraining order issued out of a superior court enjoining him from so doing, and the appellate court, having jurisdiction, has already decided that the last-mentioned superior court had no jurisdiction to make any order in said matter other than one dissolving said restraining order, it follows that the peremptory writ of mandate must issue.

APPLICATION for a peremptory Writ of Mandate to be directed to the sheriff of San Diego County, commanding him to execute a writ of execution. Granted.

The facts are stated in the opinion of the court.

George H. Moore, Raymond D. Hoyt, Henning & McGee and W. H. Wylie for Petitioner.

Eugene Daney for Respondent.

SHAW, J.—This is an application for a peremptory writ of mandate to be directed to the respondent as sheriff of San

Diego County, commanding him to execute a writ of execution issued out of the superior court of Los Angeles County in a certain action wherein Van R. Kelsey was plaintiff and James Kennedy was defendant, and requiring him to immediately, in accordance with law, proceed to sell the personal property upon which said execution was levied. As shown by answer to the petition for the writ, his refusal to proceed in enforcing the writ of execution is based upon a restraining order issued in the case of the *City of San Diego v. Van R. Kelsey* and *James C. Byers*, by the superior court of San Diego County enjoining him from so doing.

[1] In a proceeding numbered 2952, *post*, p. 229, [180 Pac. 662], wherein Van R. Kelsey is petitioner and the superior court of San Diego County is respondent, involving the validity of such restraining order and injunction, this court, for the reasons stated in an opinion this day filed, held that said superior court, by reason of continuing the hearing of the application made by the city of San Diego for a temporary injunction, had no jurisdiction to make any order in said matter other than one to dissolve the restraining order. It follows from what is said in the opinion so filed that the writ of mandate as prayed for should issue against said James C. Byers, as sheriff, and it is so ordered.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2952. Second Appellate District, Division One.—March 10, 1919.]

VAN R. KELSEY, Petitioner, v. SUPERIOR COURT OF SAN DIEGO COUNTY et al., Respondents.

[1] PROHIBITION — ACTS WITHIN JURISDICTION OF SUPERIOR COURT.—A superior court being a court of general jurisdiction, prohibition will not lie to prevent such court from proceeding to hear and determine a certain action and continuing in force a temporary injunction restraining the plaintiff and the sheriff from selling certain property under execution, even though the complaint in the action fails to state facts sufficient to warrant the action of the court.

- [2] **INJUNCTION—POINTS AND AUTHORITIES—SECTION 527, CODE OF CIVIL PROCEDURE.**—Where a temporary restraining order, granted without notice, has been vacated and set aside, the points and authorities served for use at the hearing cannot at a subsequent hearing be deemed a compliance with the statute, which in absolute terms requires the applicant for an injunction to serve upon the opposite party at least two days prior to such hearing a copy of his points and authorities.
- [3] **ID.—SECTION 527, CODE OF CIVIL PROCEDURE—INJUNCTION—DELAY IN HEARING—DISSOLUTION OF ORDER.**—Under section 527 of the Code of Civil Procedure, the court has no power to continue the hearing of a provisional injunction until some later date, but if the applicant is not ready to proceed, the court must dissolve the temporary restraining order.
- [4] **ID.—HEARING CONTINUED—COURT DIVESTED OF JURISDICTION.**—Where in such case the court made an order continuing the hearing, it thereby divested itself of jurisdiction to take any action other than to dissolve the restraining order issued.

PROCEEDING in Prohibition to prevent the Superior Court of San Diego County and C. N. Andrews, Judge thereof, from proceeding further in a certain action, except to make an order dissolving a restraining order and temporary writ of injunction theretofore granted therein. Writ granted.

The facts are stated in the opinion of the court.

George H. Moore, Raymond D. Hoyt, Henning & McGee and W. H. Wylie for Petitioner.

T. B. Cosgrove, City Attorney, and M. R. Thorp for Respondents.

SHAW, J.—In response to an alternative writ of prohibition issued by this court in the above-entitled matter, requiring respondent to show cause why it should not be prohibited from proceeding further in a certain action wherein the city of San Diego is plaintiff and Van R. Kelsey and James Byers, as sheriff of San Diego County, are defendants, an answer to said writ, consisting of a certified copy of the entire record, has been filed in this court.

It appears from the petition upon which the writ was granted that on the twenty-sixth day of July, 1918, petitioner

commenced an action in the superior court of Los Angeles County against James Kennedy, the purpose of which was to recover a money judgment against defendant therein; that at the time and upon the filing of the complaint there was duly issued by the court a writ of attachment in said action, directed to the sheriff of San Diego County, pursuant to which and the instructions given him by plaintiff, he, on July 30, 1918, attached certain personal property, consisting of tools, machinery, and other equipment, then in the possession of Kennedy and used by him in constructing what is known as the Lower Otay Dam in San Diego County, and took the same into his possession and under his control, as appears from the return upon said writ of attachment so made by said sheriff on August 10, 1918, which is as follows: "I, James C. Byers, Sheriff of the County of San Diego, hereby certify that I received the hereunto annexed Writ of Attachment on the 30th day of July, 1918, with instructions from Attorney for within named Plaintiff to attach any and all personal property belonging to the defendant, consisting of tools, horses, machinery and other equipment of every kind and description now being used in the construction of the 'Lower Otay Dam' at Otay, San Diego County, California. By virtue of the fact that the above mentioned property was already in my possession under prior attachments, the said property is held on this attachment. Dated this 10th day of August, 1918. James C. Byers, Sheriff, by F. Knefler, Deputy"; and that at all times since the levy of the writ he has had said property in his possession.

That on September 18, 1918, plaintiff in said action recovered a judgment against the defendant therein in the sum of \$11,336.12, which was duly docketed on September 19, 1918, and thereafter, to wit, on January 4, 1919, a writ of execution was duly issued thereon, commanding Byers, as sheriff of San Diego County, to make the sums due on the judgment of petitioner out of the property of said Kennedy situated within San Diego County, which execution was placed in the hands of the sheriff, with instructions to levy upon and sell the personal property, tools, machinery, and equipment owned by said Kennedy and located at said Lower Otay Dam in San Diego County, in pursuance of which writ and instructions so given, Byers, as sheriff, levied upon the property and advertised it for sale on January 17, 1919.

That thereafter, on January 15, 1919, the city of San Diego, as plaintiff, commenced an action in the superior court of San Diego County against petitioner and Byers as sheriff, the purpose of which was to enjoin the sheriff from selling the property as advertised under execution, and at the same time plaintiff in said action procured from said court a restraining order and order to show cause commanding petitioner and said Byers to show cause on the twenty-eighth day of January, 1919, why an injunction should not be issued forbidding the sale of the property, which order was duly served upon said sheriff, by reason of which fact he refused to make the sale as advertised, or enforce the writ of execution.

That on the day specified in said notice petitioner and Byers, as sheriff, appeared in response thereto and demurred to said complaint for injunction and filed objections to the issuance thereof, based upon affidavits, all of which were duly served upon the attorney for the plaintiff in said action; whereupon said superior court of San Diego County (as shown by the answer to the petition) vacated said restraining order and ordered the same discharged.

That immediately thereafter, on the same date and upon the same complaint, without amendment thereto or affidavits filed, plaintiff in said action procured to be issued out of said court another restraining order against petitioner and Byers, restraining the sheriff from selling the property of Kennedy under and pursuant to the writ of execution so issued, and requiring petitioner and sheriff to show cause on February 3d, before the Honorable C. N. Andrews, judge presiding in Department Four of said court, why an injunction should not be granted restraining the sale of said property under said execution, and meanwhile restraining said sale. That after obtaining said last mentioned order, to wit, on January 31, 1919, the plaintiff in said action wherein petitioner and the sheriff were made defendants, filed an amendment to its complaint and duly served the same, but at no time did the plaintiff therein, through its attorneys, file or serve upon petitioner or said sheriff, or upon either or any of their attorneys, any points or authorities, as required by section 527 of the Code of Civil Procedure.

That on February 1, 1919, petitioner and said sheriff filed and served their affidavits in response to said order to show cause on February 3, 1919, and notified the attorney for said

city of San Diego that petitioner and said sheriff, at the hearing of said order to show cause on February 3d, would rely upon the demurrer theretofore filed and affidavits theretofore filed, in addition to an affidavit served upon said counsel on February 1st. That, pursuant to said order, petitioner and the sheriff appeared before the Honorable C. N. Andrews, judge of said superior court, on February 3d, in response to the order to show cause, at which time Deputy City Attorney M. R. Thorp appeared and moved the court to continue the hearing of said matter upon the ground that the city attorney was then engaged in the trial of a case in another department, and that other than said city attorney and M. R. Thorp so appearing, there was no attorney in the office of the city attorney familiar with the issues of law and fact involved in said hearing; that while he was then ready and prepared to present his points and authorities in support of the contention of the city in said matter, he was then sick, and by reason of his physical condition, due to illness, was unable to present said matter and to proceed with said hearing; that the court from its observation of the physical condition of said Thorp at the time when he made said motion concluded that he was physically unable to proceed with the hearing and, over the objections of petitioner, who insisted that the hearing proceed, continued the same to February 10th, a time covering a period of more than ten days after the making of said restraining order and order requiring petitioner to show cause why a temporary injunction should not be granted.

That, notwithstanding the levy of said writ of attachment and the placing of said writ of execution in the hands of the sheriff, he has permitted and is permitting the city of San Diego, through a keeper by him placed in charge thereof, to use said property of Kennedy's so attached and levied upon, continuously, as a result of which it is being worn out and depreciated in value, which wear and tear and depreciation will continue so long as said city is permitted to use the same.

That on February 10th, the day to which said hearing was continued, petitioner and the sheriff appeared in court and objected to the court taking any proceedings in said matter other than to declare and adjudge that said restraining order dated January 28th was ineffectual, and that said order to show cause had by lapse of time become inoperative, which objections were overruled and the further hearing of the

matter continued to 2 o'clock on February 10th, at which time, as appears by supplemental petition filed, the said superior court, the Honorable C. N. Andrews presiding therein, did grant and cause to be issued a temporary injunction wherein said Byers as sheriff was ordered to desist and refrain from selling the property of Kennedy so levied upon at the Lower Otay Damsite, in the county of San Diego, under and in pursuance of the execution issued out of the superior court of Los Angeles County in favor of Van R. Kelsey and against James Kennedy, or in any manner or in any wise interfering with plaintiff's possession and use of said property pending the final determination of the action.

[1] Plaintiff insists, first, that the complaint filed by the city fails to state facts entitling plaintiff to any injunctive relief. This for the reason that at the time when the levy under the writ of attachment was made Kennedy owned and was in possession of the property, and the city, though asserting a lien upon the property by virtue of a clause in a contract existing between it and Kennedy, had in fact no lien thereon or claim thereto recognizable in law. Assuming this contention to be well founded, and also that petitioner has just cause for grievance due to the action of the sheriff in what upon this record appears to be a plain violation of his official duty in permitting the property to be used by the city, the effect of which, owing to such use and resulting deterioration, must necessarily greatly depreciate the value thereof, nevertheless upon such facts it cannot be said respondent, if it erroneously issued the restraining order and temporary injunction, acted in excess of its jurisdiction. It is a court of general jurisdiction having power to entertain the class of proceedings in question. It had before it the parties to the action. The subject matter of the litigation, which the court was called upon to determine, was plaintiff's right to the relief prayed for upon the facts stated in the complaint. "Whether the particular facts on which the court proceeds in that regard are or are not sufficient to justify its exercise of jurisdiction is a question of law the solution of which, either way, cannot impair the court's right to apply its judicial power in the premises, according to its view of the law, and of the facts before it." (*State ex rel. Union Depot R. Co. v. Valliant*, 100 Mo. 59, [13 S. W. 398].) Hence, conceding a total absence of facts alleged in the complaint to war-

rant the action of the court, nevertheless it, in making the orders complained of, acted in the exercise of its jurisdiction, and if while so doing it erred, such error cannot be made the basis for prohibition, but must, for like error in an ordinary civil action, be corrected on appeal.

[2] Petitioner, conceding the restraining order to have been properly made, next insists that the court upon the proceedings shown to have been taken had no power to make any order other than to dissolve the restraining order. This contention is based upon the provisions of section 527 of the Code of Civil Procedure, which, among other things, provides that "in case a temporary restraining order shall be granted without notice, . . . the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than ten days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order." While points and authorities were served upon defendant in the action brought by the city, prior to the time fixed for the hearing of the restraining order first granted and thereafter vacated, no points and authorities were so served in support of the application made and set for hearing on February 3d. Upon the vacation of the restraining order first granted, the proceeding for temporary injunction terminated. The service of such points and authorities for use at the hearing thereof cannot, as to the order here involved, be deemed a compliance with the provisions of the statute, which in absolute terms requires the applicant for an injunction to serve upon the opposite party, at least two days prior to such hearing, a copy of his points and authorities. [3] Not only was there a failure of the plaintiff in said action to comply with this provision, but it appears from the application made for a continuance that there was an absence of compliance with

the provision of the statute to the effect that at the time fixed for the hearing, the applicant for the injunction *must be ready* to proceed with the hearing. Otherwise, in express and positive terms, the statute provides that "the court *shall dissolve the temporary restraining order.*" The purpose of the statute is plain. In enacting it the legislature intended not only that an injunction should not be granted without notice, but that the power of the court to restrain the act sought to be enjoined temporarily should be restricted to the time specified in the statute. The illness of an attorney cannot be deemed ground for continuing a restraining order in effect beyond the time fixed by statute, nor is it an excuse for noncompliance with its terms, any more than such illness would excuse his client for failure to file notice of motion for a new trial within the time specified therefor. In this proceeding it appears that the city attorney knew of his engagements in another department, and knew that his deputy, M. R. Thorp was ill, although he appeared in court and stated that he had his points and authorities prepared to submit, and further appears the city attorney had two other deputies who might have appeared and represented the city. The provisions of section 527 provide a complete scheme in a proper case for the obtaining of a writ of injunction, and such scheme must be deemed the measure of the power to be exercised by trial courts in the matter of provisional injunctions. (*United Railroads v. Superior Court*, 170 Cal. 755, [Ann. Cas. 1916E, 199, 151 Pac. 129].) The effect of the order made was to nullify the terms of the statute, which are so plain and unambiguous that no room exists for interpretation. (*German Sav. etc. Society v. Aldrich*, 5 Cal. App. 215, [89 Pac. 1063].)

[4] By its action in continuing the hearing the court was, in our opinion, divested of jurisdiction to take any action on February 10th other than to dissolve the restraining order so issued. It follows from what has been said that the peremptory writ of prohibition should be granted. It is, therefore, ordered that the respondent refrain and desist from any action or proceeding based upon the restraining order made on February 3, 1919, or the order made on February 11, 1919, granting a temporary writ of injunction, or the enforcement thereof, in that certain cause wherein the city of San Diego is plaintiff and Van R. Kelsey and James C. Byers are defendants, now pending in the superior court of San Diego

County, other than to make an order dissolving the restraining order and temporary writ of injunction so granted in said matter.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2842. First Appellant District, Division One.—March 11, 1919.]

ANNA B. NILSON et al., Respondents, v. WALFRID WAHLSTROM et al., Appellants.

- [1] **EASEMENTS—RESERVATION OF PERPETUAL RIGHT OF WAY—CONSTRUCTION.**—Where the owner of a tract of land conveys a strip thereof to another, reserving to himself, as an easement in favor of the remaining portion of the tract, a perpetual right of way over and across the strip conveyed, such reservation constitutes and reserves only an easement appurtenant to such remaining portion of the tract, and not an easement in gross in such grantor apart from his ownership of such portion.
- [2] **ID.—RIGHT OF GRANTOR TO MAKE LATER CONVEYANCE.**—As such a reservation embraces only an easement appurtenant to a particular tract of land, the grantor has nothing in the way of an easement in gross which he can later convey to the owners of other tracts of land.
- [3] **APPEAL—ACTION TO QUIET TITLE—DEDICATION—WAIVER OF ISSUE.**—In an action to quiet title to a strip of land over which the defendants claim an easement, the issue as to whether said strip had been dedicated to public use cannot be urged for the first time on appeal.

APPEAL from a judgment of the Superior Court of Sonoma County. Thomas C. Denny, Judge. Affirmed.

The facts are stated in the opinion of the court.

G. P. Hall and E. J. Dole for Appellants.

R. L. Thompson and R. M. Barrett for Respondents.

RICHARDS, J.—This is an appeal from a judgment in the plaintiffs' favor in an action to quiet their title as against the

defendants to a strip of land thirty feet wide running across what is known as the Marshall ranch, in the county of Sonoma, and containing .55 acres of land.

The facts out of which the respective claims of the parties herein arise to interests in this strip of land are these: The ranch was a goodly number of years ago subdivided. In the year 1907 one Geo. P. McNear was the owner of a tract within the boundaries of said ranch containing nearly 17 acres, including this strip, which constituted the northerly thirty feet across the width thereof. The plaintiffs Nilson and Abrahamson were the owners of two other tracts in said ranch to the westward of the McNear tract. On June 8, 1907, McNear conveyed to Anna B. Nilson and Albertine Abrahamson said thirty foot wide strip of land extending from the county road to their properties, and in said conveyance he inserted the following reservation: "Reserving, however, unto the said party of the first part and the 16.30 acre tract hereinafter described as an easement in favor of said tract of 16.30 acres forever, and in favor of every piece and parcel thereof and in favor of the said party of the first part, his grantees, heirs or assigns, and all persons who may purchase any portion of said 16.30 acre tract, the perpetual right of way over and across said strip hereinbefore described, containing .55 acres." On February 24, 1917, said McNear undertook to convey to the defendants herein, who own tracts of land on the northerly side of said strip, rights of way over and across the same. When these defendants undertook to exercise the rights purported to have thus been granted them by McNear, the plaintiffs brought this action to quiet their title to the strip. The defendants appeared and answered denying the plaintiffs' exclusive right to said strip, and setting up affirmatively by both their answer and by a cross-complaint the aforementioned source and extent of their asserted rights in and to the use of the same. Upon the trial, the court found in the plaintiffs' favor and rendered its judgment accordingly, quieting their title to the strip. Upon this appeal the first and in fact the only available question is that of the construction to be given to the reservation in the deed from McNear to the plaintiffs above set forth. The respondents contend that it constitutes and reserves only an easement appurtenant to the lands of which it was the northerly portion retained by McNear, and no other or further easement or interest in McNear.

The appellants contend that the said reservation is also to be construed as reserving an easement in gross in McNear apart from his ownership of his said adjoining land, which said easement in gross was transferable and transferred to the appellants.

[1] We are entirely satisfied that the contention of the respondents which was upheld by the trial court must be sustained upon this appeal upon the authority of the following cases: *Hopper v. Barnes*, 118 Cal. 636, [45 Pac. 874]; *Wagner v. Hanna*, 38 Cal. 111, [99 Am. Dec. 354]; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 106, [93 Pac. 900]; *Jones v. Deardorff*, 4 Cal. App. 18, [87 Pac. 213]. [2] The reservation in McNear thus construed as embracing only an easement appurtenant to the lands then owned by him and bounded on the north by this strip, it follows that he had nothing in the way of an easement in gross which he could have later conveyed to the defendants and appellants herein, and hence that as to them and their asserted rights of way over said strip derived from McNear the plaintiffs were entitled to have their title quieted.

The appellants undertake to further urge upon this appeal that the evidence in the case showed that the said strip of land had been dedicated to the public use, and that as a portion of the general public they were entitled to a right of way over it for ingress to and egress from their premises. In respect to this contention it is only necessary to say that no such issue was presented by the pleadings or embraced in the findings of the court, or in fact raised upon the record before us. [3] The question cannot, therefore, for the first time be urged upon this appeal.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2826. First Appellate District, Division One.—March 12, 1919.]

KATE I. NIXON, Appellant, v. ELSIE H. RAMSEY,
Executrix, etc., Respondent.

- [1] **STATUTE OF LIMITATIONS — SUFFICIENCY OF ACKNOWLEDGMENT OF DEBT.**—An acknowledgment of a debt sufficient to take the case out of the operation of the statute of limitations must be a distinct, unqualified, unconditional recognition of the obligation for which the person making such admission is liable.
- [2] **ID.—PAYMENT OF OUTLAWED PROMISSORY NOTES — INSUFFICIENT ACKNOWLEDGMENT.**—A written indorsement on a letter demanding payment of certain outlawed promissory notes that "It is impossible right at the Present time—For me to Pay any Part of the above amount—I Hope to be able Some time Soon to hole thing up—I am not making any Promises—I hope to be able to Pay the hole thing up *Some day*," is not an acknowledgment of the debt, within the contemplation of section 360 of the Code of Civil Procedure, sufficient to take the case out of the operation of the statute of limitations.

APPEAL from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge. Affirmed.

The facts are stated in the opinion of the court.

Ira S. Lillick for Appellant.

Preston & Preston for Respondent.

WASTE, P. J.—This is an appeal by plaintiff from a judgment made and entered after demurrer to the complaint sustained without leave to amend.

The action was brought by the plaintiff to recover judgment against defendant, as executrix of the last will and testament of H. Ramsey, deceased, on three promissory notes made, executed, and delivered by said H. Ramsey, during his lifetime, to the First National Bank of Winnemucca, Nevada, and by said bank indorsed, signed, and delivered to the plaintiff herein.

The notes were dated respectively November 20, 1909, December 31, 1909, and July 10, 1912, and, being executed out

of the state of California, were barred by the statute of limitations when the complaint was filed, September 6, 1916. (Sec. 339, Code of Civil Procedure, subd. 1, as said section provided prior to the amendment of 1917, [Stats. 1917, p. 299].)

On or about the tenth day of December, 1914, plaintiff, by and through her duly authorized agent, one M. D. Fairchild, demanded of said H. Ramsey payment of said notes. The demand was in writing and was as follows:

“The Nixon National Bank.

“Reno, Nevada, Dec. 10, 1914.

“Mr. H. Ramsey,

“Piedmont, Cal.

“Dear Sir:

“In handling various matters of the estate of Geo. S. Nixon, deceased, I find that there are three notes signed by you, as follows:

“December 31, 1909, \$10,400.00, November 20, 1909, \$825.00 and July 10, 1912, for \$2,250.00, making a total of \$13,475.00 principal with considerable unpaid interest. As the affairs of the estate are about ready for a final distribution, it has occurred to me that perhaps we can come to some arrangement, whereby it will be of mutual benefit to all concerned, relative to the settlement of these notes.

“I would be very glad to hear from you at an early date and oblige.

“Yours, truly,

“M. D. FAIRCHILD.”

Thereafter, and on the fourteenth day of January, 1915, the said H. Ramsey, in writing, and upon the face of the aforesaid written demand, and below it, subscribed, signed, and delivered to plaintiff herein, by and through said M. D. Fairchild, the said agent of said plaintiff, an acknowledgment of said promissory note, which said acknowledgment was in the following words and figures, viz.:

“Jan. 14th, 1915.

“It is impossible right at the Present time—For me to Pay any Part of the above amount—I hope to be able Some time Soon to hole thing up—I am not making any Promises—I hope to be able to Pay the hole thing up *Some day*)

“H. RAMSEY.”

The sole question presented on this appeal is: Is the document pleaded by the plaintiff an acknowledgment of a debt within the contemplation of section 360 of the Code of Civil Procedure, sufficient to take the case out of the operation of the statute of limitations?

Under the well-established rule in this state we are of the opinion that it is not. [1] An acknowledgment sufficient to take the case out of the operation of the statute must be a distinct, unqualified, unconditional recognition of the obligation for which the person making such admission is liable. (*Snyder v. Dederichs*, 39 Cal. App. 628, [179 Pac. 535]; *Powell v. Petch*, 166 Cal. 329, [136 Pac. 55], and the cases cited.)

The writing indorsed by Ramsey on the letter to Fairchild, the agent, falls far short of containing an admission of a new contract which would take the indebtedness out of the statute of limitations. It was written after the bar of the statute had attached and must be viewed in the light of that fact. (*Southern Pacific Co. v. Prosser*, 122 Cal. 415, [52 Pac. 836, 55 Pac. 145].) [2] Tested by the rule announced in the cases above cited and many others in this state, it is clear that there is nothing contained in the letter from Ramsey to Fairchild which can be construed as an unconditional promise on the part of Ramsey to pay the outlawed debt. (*Snyder v. Dederichs*, *supra*.) The judgment is affirmed.

Kerrigan, J., and Richards, J., concurred.

[Crim. No. 654. Second Appellate District, Division One.—March 12, 1919.]

In the Matter of the Application of GRACE JOHNSON for
a Writ of Habeas Corpus.

[1] POLICE POWER—HEALTH REGULATION—DISCRETION OF LEGISLATURE.

The adoption of measures for the protection of the public health is a valid exercise of the police power of the state as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof.

[2] ID.—AFFLICTION WITH CONTAGIOUS DISEASE—ISOLATION.—The isolation of one afflicted with a contagious or infectious disease is a rea-

sonable and proper measure to prevent the increase and spread thereof.

- [3] **ID.—ABUSE OF AUTHORITY DELEGATED—QUARANTINE.**—The fact that the authority delegated to those charged with the duty of enforcing the law may, in a given case, be abused, is no legal reason for denying the power to quarantine summarily in a case where grounds therefor concededly exist.
- [4] **EVIDENCE — COMMUNICABILITY OF DISEASE — JUDICIAL NOTICE.**—The courts may not take judicial notice that gonococcus infection is non-communicable except by actual contact.
- [5] **POLICE POWER — QUARANTINE REGULATIONS—JUDICIAL DETERMINATION OF INFECTION UNNECESSARY.**—It is not necessary that it be first judicially established by some proceeding in court that a person is afflicted with a contagious disease before that person can be subjected to quarantine regulations.

APPLICATION for a Writ of Habeas Corpus, originally made to the Supreme Court, the writ being issued made returnable to the District Court of Appeal. Petitioner remanded to custody.

The facts are stated in the opinion of the court.

Paul W. Schenck for Petitioner.

Erwin W. Widney, City Prosecutor, and W. K. Crawford, Deputy City Prosecutor, for Respondent.

Kemper B. Campbell, *Amicus Curiae*.

SHAW, J.—Upon petitioner's application therefor, the supreme court issued a writ of *habeas corpus* made returnable to this court after its denial of a similar petition.

It appears from the return to the writ and oral evidence of Dr. Bettin, who is connected with the city health department of Los Angeles, that petitioner was, on November 12, 17, and 22, 1918, with her consent, examined and found to be afflicted with gonococcus infection, and thereupon, by order of the health commissioner of the city, confined in a hospital for treatment, which, with the view of effecting a cure, was administered until December 5, 1918, at which time, upon application for a writ of *habeas corpus*, she was, by the superior court, released on bail, at the hearing of which, on

February 8, 1919, she was remanded to custody and returned to the hospital, since which time she has steadfastly refused to accept any treatment or submit to any examination. There was no showing or claim that she received treatment while absent from the hospital; nor, indeed, any evidence whatsoever offered in support of the contention that she was not now and had never been so afflicted. The testimony of Dr. Bettin is that, without treatment, the disease would continue its course and that at the present time, in her opinion, petitioner is still afflicted with said infection.

[1] The adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof. (Black's Constitutional Law, sec. 108; *Holden v. Hardy*, 169 U. S. 392, [42 L. Ed. 780, 18 Sup. Ct. Rep. 383, see, also, Rose's U. S. Notes]; *State v. Somerville*, 67 Wash. 638, [122 Pac. 324]; *State Board of Health v. Board of Trustees*, 13 Cal. App. 514, [110 Pac. 137].) The legislature in its discretion having determined the character of the disease in question, has imposed upon the health department of the city the duty, when having knowledge that one is afflicted therewith, of taking the necessary measures to prevent its spread.

In the absence of any showing to the contrary, we must, upon the evidence before us, assume that petitioner was, when subjected to quarantine regulations, and is now, afflicted with and suffering from gonococcus infection, which, by section 2979a of the Political Code (Stats. 1917, p. 171), is, with leprosy, smallpox, typhus fever, and a number of other diseases, declared to be contagious and infectious. The sole question thus presented is the right of proper authorities to isolate and place her in quarantine. By the section of the code just cited it is made the duty of the health officer, knowing the existence of any such contagious or infectious disease, to take such measures as may be necessary to prevent the spread thereof. [2] The isolation of one afflicted with a contagious or infectious disease is a reasonable and proper, indeed the usual, measure taken to prevent the increase and spread thereof.

It appears that petitioner was originally taken into custody without a warrant and, basing his argument upon such arbitrary action, counsel draws a lurid picture of what might result from maladministration of the law by those charged with the duty of enforcing it. [3] The fact that the authority so delegated may, in a given case, be abused is no legal reason for denying the power to quarantine summarily in a case where grounds therefor concededly exist. (*Ex parte Whitley*, 144 Cal. 167, [1 Ann. Cas. 13, 77 Pac. 879]; *Brown v. State*, 59 Wash. 195, [109 Pac. 802].) Possible maladministration of the law is no concern of petitioner, unless such administration thereof is shown to have affected her. Nor can her arrest without a warrant, after which and while being illegally held, an examination was made with her consent which disclosed the existence of the infection, avail her in this proceeding. Assuming the action of the police officer arbitrary and unjustified, she is not restrained of her liberty by reason thereof, but on account of a disease with which she was subsequently found to be afflicted, and in the ascertainment of which fact there appears to have been no arbitrary or unlawful action taken.

There is no merit in the contention that the infection with which petitioner is afflicted is noncommunicable except by actual contact, which contact in such cases must be predicated upon the assumption that an offense cognizable by law will be committed. [4] Assuming that grounds exist for petitioner's contention, no evidence tending to establish such fact has been presented and it is not a matter as to which the court may take judicial notice.

Counsel cites no authorities in support of the contention that one afflicted with a contagious disease cannot be subjected to quarantine regulations until it is first judicially established by some proceeding in court that he is so afflicted. [5] Manifestly to uphold such contention would render laws for the protection of the public health nugatory. (*State v. Superior Court*, 103 Wash. 409, [174 Pac. 973], where the matter is fully considered.) The writ no doubt was granted upon the argument that petitioner was not, and never had been, afflicted with the infection, which if true would entitle her to be discharged from custody. The return and evidence taken at the hearing conclusively establish the fact to the contrary.

In our opinion, the return and evidence taken at the hearing show a legal cause for the detention of petitioner, and she is remanded to custody.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1940. Third Appellate District.—March 13, 1919.]

CALIFORNIA LAND SECURITY COMPANY (a Corporation), Appellant, v. **DON RITCHIE et al.**, Respondents.

- [1] **VENDOR AND VENDEE—SALE OF LAND—QUANTUM OF ESTATE.**—Where one party agrees to convey, and the other party agrees to purchase, all the former's right, title, and interest in and to his real estate, such contract means the sale and purchase of such interest as the first party has in the premises, and not any particular estate or fee simple.
- [2] **BROKER'S COMMISSIONS—SALE OF PROPERTY—TERMS UNSATISFACTORY—DUTY OF VENDOR.**—Where property is sold to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract, abstract, or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale for his commissions if he refuses to accept the purchaser.
- [3] **ID.—CONFLICTING EVIDENCE—FINDING.**—The finding of the trial court as to what transpired when the broker presented the contract of purchase to the intending vendor is conclusive on the appellate court where the evidence was conflicting.
- [4] **VENDOR AND VENDEE—TERMS OF PAYMENT—CHECK NOT CASH.**—The terms "one-half down and the balance in five equal annual payments" mean a payment in cash down; and, though a payment by check may be a "cash payment," the vendor cannot be required to accept that mode of payment. If he objects to it, the objection is good and he need not bind himself to convey until the objection is removed by the offer at the time of a different method of payment, reasonable in character and satisfactory to him.
- [5] **ID.—CONTRACT OR OPTION—TEST.**—The test determinative of the question whether a given agreement relating to the sale and purchase of land is an agreement to purchase and sell the property or

a mere option to purchase the same is: Is the agreement capable of specific performance?

- [6] **ID.—RIGHT OF ELECTION IN VENDEE—SPECIFIC PERFORMANCE.**—An agreement relating to the sale and purchase of land which gives to the buyer the choice of either purchasing the property on stated terms or refusing to complete the purchase and so forfeiting to the seller a sum fixed in the contract as damages for such noncompliance, is wanting in mutuality and, therefore, not capable of specific performance.
- [7] **BROKER'S COMMISSIONS—DUTY OF AGENT.**—A broker, to be entitled to the agreed commission, must produce a purchaser able, willing, and ready to purchase; and where he produces a proposed purchaser, who reserves to himself the right of election either to purchase or arbitrarily refuse to do so, or to refuse to purchase, even though a perfect title be shown, the broker has not produced a purchaser ready and willing to purchase, even though he has the ability to do so.
- [8] **ID.—EXCLUSIVE AGENCY—SALE BY OWNER.**—Where the agreement vests in the broker an exclusive agency and so makes it the sole agent for the sale of the property for a given period, but does not confer on such broker the exclusive right to sell, the owners, either collectively or individually, might, pending the period of the agency and before the broker has secured a purchaser or a valid agreement from a proposed purchaser willing and able to make the purchase according to the authorization to sell previously executed, sell or make sale without becoming liable for commissions.

'APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge. Affirmed.

The facts are stated in the opinion of the court.

Hawkins & Hawkins for Appellant.

Carlton C. Case for Respondents.

HART, J.—Plaintiff brought the action to recover \$6,227.50 as commissions for having found a purchaser for certain lands of defendants. From a judgment in favor of defendants for costs, plaintiff prosecutes this appeal.

The action is based, first, upon what is termed by the parties and what we shall herein call a "brokerage contract," which reads as follows:

"Oakland, Cal., Mar. 1st, 1916.

"Calif. Land Security Co.,

"San Francisco, Cal.

"Gentlemen:

"You are authorized to sell all our interest in the Ritchie Ranch in Stanislaus Co., Calif., at the price of seventy dollars per acre for the front land containing 1350 acres and forty dollars per acre for the river land containing 284 acres.

"Terms to be one-half down and the balance in five equal annual payments at six per cent interest.

"In case a sale is made you are to receive five dollars per acre so far as our interest appears in said purchase price.

"This agreement can be canceled by giving thirty days notice in writing and to be exclusive for thirty days or until notice is given to C. B. Hubbard or to Calif. Land Security Co., of San Francisco.

"Yours truly,

"DON RITCHIE.

"MRS. JOSIE M. RITCHIE.

"MRS. BELLE LIGHTNER."

On the sixteenth day of March, 1916, plaintiff presented to the defendants, Don Ritchie and Mrs. Josie M. Ritchie, a document of which the following is a copy:

"This agreement, made and entered into this 13th day of March, 1916, by and between F. H. Arnsburger, the party of the first part, and Josie M. Ritchie, Don Ritchie and Belle Lightner, the parties of the second part,

"Witnesseth: That the party of the first part agrees to purchase from the parties of the second part, and the parties of the second part agree to sell to the party of the first part all their right, title, estate and interest in and to that certain tract of real estate situated in the county of Stanislaus, state of California, and particularly bounded and described as follows, to wit: [Describing land known as the 'J. M. Ritchie Ranch.']

"It is understood that 80 acres of said tract of land belongs to Josie M. Ritchie in severalty and the rest of said land the second parties own in common, each owning an undivided one-fourth interest therein.

"The party of the first part agrees to pay for said land at the rate of \$70.00 per acre for the front land, being the south-westerly portion of said land and comprising 1350 acres and

at the rate of \$40.00 per acre for the river land comprising 284 acres; and the party of the first agrees to pay to the parties of the second part on the sale the sums set opposite the respective names, to wit:

"Josie M. Ritchie, the sum of \$30,665.00

"Don Ritchie, the sum of \$25,065.00

"Belle Lightner, the sum of \$25,065.00;

and agrees to pay said purchase price as follows: One-half in cash at the time of delivery of deed, and the balance to be evidenced by a note secured by a mortgage payable in five equal annual payments with interest at the rate of six per cent. per annum. . . .

"It is also understood and agreed that a mortgage in form substantially like that ordinarily in use by the Stockton Savings and Loan Society will, subject to the terms hereof, be used. Taxes shall be pro-rated as of the time of delivery of deed.

"It is understood that the party of the first part shall have a reasonable time to examine the title to said land and if the title is imperfect and cannot be perfected within sixty days after written notice to C. B. Hubbard of the defect, the deposit may be returned and the parties of the second part agree to convey their said interest in said premises as above defined, to the party of the first part with a valid title free and clear of encumbrances.

"It is understood and agreed that the sum of \$100.00 has been paid by the party of the first part to C. B. Hubbard, the agent of the parties of the second part, as a deposit upon said land, and the party of the first part shall pay the balance of one-half of the purchase price above mentioned to the parties of the second part after he shall have had a reasonable time to examine the title to said land, and if the title to said land is a valid title and free and clear of encumbrances and the party of the first part refuses to complete and carry out this contract, then in that case the money paid to C. B. Hubbard shall be forfeited to and belong to the parties of the second part as liquidated damages, and this contract shall thereupon become null and void.

"In witness whereof the parties hereto have hereunto and in duplicate set their hands and seals the day and year first above written.

"F. H. ARNSBURGER. (Seal)"

Then followed the certificate of a notary public that said Arnsburger had acknowledged and executed said instrument before him.

The court found that the foregoing agreement was signed by Arnsburger; that it was presented to the defendants, the Ritchies, to be signed, together with the offer of a check for one hundred dollars; that the Ritchies refused to sign it and declined to accept said check; that the said agreement was never presented to the defendant, Lightner, for her signature; that plaintiff never thereafter made any other or further request or demand upon the defendants to sign said instrument; that, prior to the fifteenth day of March, 1916, and before said Arnsburger signed said agreement of purchase and sale, the defendant, Lightner, without the assistance of the plaintiff, found a purchaser and thereupon sold and conveyed all her interest in the land described in the brokerage contract with the plaintiff, and that said sale was not made to defraud or deprive plaintiff of its commissions; that eighty acres of said ranch was owned in severalty by Josie M. Ritchie, and that the balance, consisting of 1,554 acres, was owned, an undivided one-fourth by Josie M. Ritchie, an undivided one-fourth by Belle Lightner, and an undivided one-fourth by John Raggio and Edward F. Harris; that when said Arnsburger executed said contract he did not know that the said Raggio and Harris owned an undivided one-fourth of the 1,554 acres or that they or either of them were owners of or interested in said land or any part thereof; that the plaintiff never found or presented to the defendants, or any of them, a purchaser or prospective purchaser ready, able, and willing to purchase the property described in said brokerage contract, in accordance with the terms of said contract, or to purchase the interest of the defendants in and to said land upon the terms expressed in said brokerage contract; that said Arnsburger was not, on the nineteenth day of March, 1916, or at the time he signed said contract of sale, or at any time while said brokerage contract was in effect, ready or willing to purchase the interest of the defendants in and to the said land, and that plaintiff did not perform the terms and conditions of said brokerage contract by it to be performed, "and did not perform the services required of it by the terms and conditions of said brokerage contract"; that the defendants never refused or declined to carry out the terms of the brokerage

contract, "but at all times, when the same was in force, stated that they were willing and ready to perform the terms and conditions of said contract on their part to be performed."

The general objection raised by the appellant to the result reached by the court below is that the findings that the plaintiff did not produce before the respondents a purchaser able, ready, and willing to purchase the lands described in the brokerage contract and that the respondents "were, at all times, when the same was in force, willing and ready to perform the terms and conditions of said contract on their part to be performed," are not supported by the evidence.

The specific points made by the respondents in support of the judgment are: 1. That there is a material variance or difference between the agreement of the plaintiff and the proposed agreement of sale signed by Arnsburger and submitted by the appellant to the respondents for their approval and signatures, particularly in that, while the brokerage agreement authorized the appellant to sell such *interest* only as respondents have in the land, the proposed agreement of purchase signed by Arnsburger called for the sale to him by the respondents of the land itself—a distinction quite important in almost all transactions involving agreements to convey real property; 2. That the so-called agreement of purchase signed by Arnsburger was not an agreement of sale and purchase, but a mere option to purchase.

The learned trial judge, on deciding the case, filed a written opinion in which he held that the objection first above stated to the agreement proposed and submitted by the appellant to the respondents for the latter's approval is well taken; that in his opinion the contract between the appellant and the respondents went no further than to authorize the former to negotiate the sale of the interest only of the respondents in the land, while the proposed agreement of purchase provided for a sale of the land itself, and that the respondents were, therefore, justified in refusing to sign the latter agreement as not conforming in a vital particular to the appellant's authority to negotiate the sale. Upon this theory, the court held and decided that the appellant did not bring to the respondents a purchaser able, willing, and ready to purchase their interest in the land upon the terms and conditions specified in its authorization to sell, and that, consequently, it was entitled to no compensation for any services it had per-

formed or trouble and expense to which it had gone to procure the agreement signed by Arnsburger.

The Arnsburger agreement, it will be observed, contains the following paragraph: "It is understood that the party of the first part shall have a reasonable time to examine the title to said land, and, if the title is imperfect and cannot be perfected within sixty days after written notice to C. B. Hubbard of the defect, the deposit may be returned, and the parties of the second part agree to convey their said interest in said premises as above defined, to the party of the first part, with a valid title, free and clear of any encumbrances." It is undoubtedly true that this language appears to go beyond the scope of the written authorization vested in the appellant to sell the land. As seen, the latter instrument authorized the appellant to find a purchaser of such interest only as the respondents have in the land. It nowhere authorized him to find a purchaser of the land itself, as appears to be the proposition involved in the purported agreement of sale and purchase. [1] As is pointed out in the opinion of the learned trial judge, the cases seem to be quite uniform upon the proposition that where one party agrees to convey, and the other party agrees to purchase, all the former's right, title, and interest in and to his real estate, such contract merely means the sale and purchase of such interest as the first party has in the premises, and not any particular estate or fee-simple. (See *Ward v. Foley*, 141 Fed. 364, 366, [72 C. C. A. 140]; *Henderson v. Beatty*, 124 Iowa, 163, [99 N. W. 716]; *Reynolds v. Shaver*, 59 Ark. 299, [43 Am. St. Rep. 36, 27 S. W. 78]; *Van Rensselaer v. Kearney et al.*, 11 How. (U. S.) 297, [13 L. Ed. 703, see, also, Rose's U. S. Notes].)

It is contended by the appellant, however, that it was the duty of the respondents to point out specifically, at the time the Arnsburger agreement was presented to them for their approval and signatures, any objections they had to that instrument or any of its covenants, that they failed to do so or, at any rate, did not object to it on the ground that, in its scope, it transcended the terms of the brokerage agreement between them and the appellant, and that, having so failed to state such objections, it is now too late to object to any purpose. This is the most serious problem presented in connection with the point we are now considering, assuming, of course, as we shall at all times assume for the purpose of con-

sidering said point, that the Arnsburger agreement involved a contract of sale and purchase. [2] It has been held, upon the soundest of reason, that where a broker has negotiated the sale of real property to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract as to payment, or the abstract or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and that where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale for his commissions if he refuses to accept the purchaser. (*Smith v. Keeler*, 151 Ill. 518, [38 N. E. 250]; *Fenn v. Ware*, 100 Ga. 563, [28 S. E. 238]; *Donley v. Porter*, 119 Iowa, 542, [93 N. W. 574]; *Blood v. Shannon*, 29 Cal. 393; *Fiske v. Soule*, 87 Cal. 313, [25 Pac. 430].)

Don Ritchie testified that he did not like the language of the contract. He could not, or at least did not, give any particular reason for his objection to the instrument itself. He did testify, though, that he said to the appellant, when the latter presented the instrument to him and his mother for their signatures, that he did not know Arnsburger or know anything of him, and that he would prefer meeting that gentleman personally before he and his mother entered into a binding agreement of any sort, or language to this effect. His reasons for desiring personally to meet and know something of the proposed purchaser before going further with the deal, he said, were that the plaintiff had had previous options on or agreements to sell the same property, and had telegraphed or telephoned him at Bakersfield to go to Stockton and meet persons who had agreed to buy the property, and that in each of such instances the efforts of the plaintiff to drive a bargain with such parties had failed. He therefore wanted to know with certainty from some investigation of his own that Arnsburger was not only willing to buy their interest, but able and ready to do so. He further testified that he refused to accept the check for one hundred dollars tendered by the plaintiff to him and his mother as "earnest-money" or a penalty for failure to complete the deal because of his objection to that method of the payment of that sum for the purpose stated, adding that he had lost confidence in the plaintiff or its representatives. [3] This story of what occurred on the occasion of the submission of the Arnsburger agree-

ment to the respondents was flatly contradicted by the witness, Hubbard, president and general manager of the plaintiff, who conducted the transaction on behalf of plaintiff, but the court having accepted it as true, we are required to consider the proposition to which it relates accordingly.

As to the first ground of objection, we seriously question its validity. The second ground, though, possesses some force. Indeed, we think it was sufficient to justify the respondents in refusing to sign the instrument, and unless removed within a reasonable time, to decline absolutely to sell the property to Arnsburger. The terms specified in said instrument, as to payment, were "one-half down and the balance in five equal annual payments," etc. [4] This meant a payment in cash down, and, though a payment by check may be a "cash payment," the vendor cannot be required to accept that mode of payment under such an agreement. If he objects to it, the objection is good and he need not bind himself to convey until the objection is removed by the offer at the time of a different method of payment, reasonable in character and satisfactory to him. It appears from the evidence—in fact, it was admitted by Hubbard—that this objection was not removed or overcome, the check having been returned by Hubbard to Arnsburger within a few days after the time that the Ritchies refused to sign the purported agreement of sale and no other offer of such payment made.

The foregoing discussion has been, as seen, upon the assumption that the instrument submitted to the Ritchies by the appellant for their signatures was an enforceable contract to sell and purchase. But the question arises upon a consideration of the following covenant in said agreement whether it is such an agreement or a mere option to purchase the property: "It is understood and agreed that the sum of \$100.00 has been paid by the party of the first part to C. B. Hubbard, the agent of the parties of the second part, as a deposit upon said land, and the party of the first part shall pay the balance of one-half of the purchase price above mentioned to the parties of the second part after he shall have had a reasonable time to examine the title to said land, and if the title to said land is a valid title and free and clear of encumbrances and the party of the first part refuses to complete and carry out this contract, then in that case the money paid to C. B. Hubbard shall be forfeited to and belong to the parties

of the second part as liquidated damages, and thereupon this contract shall become null and void."

[5] The test determinative of the question whether the said agreement, containing as it does the foregoing covenant, is an agreement to purchase and sell the property described therein or a mere option to purchase the same is: Is said agreement capable of specific enforcement?

There are two classes of contracts for the conveyance of lands, in which penalties are annexed for the breach of the covenants thereof, and in one of which classes specific performance will be decreed and in the other denied, viz.:

1. Where the contract contains a stipulation for the payment of sums of money, called penalties or liquidated damages, the sole purpose of which stipulation is to secure the performance of the contract or the acts specified therein to be performed. Thus, in *Koch v. Streuter*, 218 Ill. 546, [2 L. R. A. (N. S.) 210, 75 N. E. 1049], which was an action to reform a contract for the sale of real property and for the specific performance of the same when reformed in the particular prayed for in the bill, the contract contained a covenant or stipulation that "if either party fails to keep or perform the covenants hereinabove specified said party so defaulting shall forfeit to the other the sum of \$1,000.00, said sum being the agreed liquidated damages," and the Illinois supreme court held that said stipulation for liquidated damages was intended "merely as a security for the performance of the contract and that there is nothing in the terms of the contract to justify the conclusion that either party has the right to perform the contract, or in lieu thereof, to pay the sum of \$1,000.00." The court concluded: "As the contract, therefore, is not alternative in its nature, a court of equity is not ousted of its jurisdiction to decree a specific performance by reason of the condition contained in the contract in reference to the forfeiture of one thousand dollars as agreed liquidated damages."

2. Where there is inserted in the contract a covenant or stipulation that the party who is to perform the contract may at his election do one of two things—that is, where the stipulation is that the proposed purchaser may either consummate the purchase or, in default thereof, pay to the seller a certain specified sum as liquidated damages for the breach or the failure to purchase—in which case the agreement is to be con-

strued as a mere option whose terms are incapable of specific enforcement.

The distinction thus noted is considered and stated by the supreme court of Texas as follows in *Redwine v. Hudman*, 104 Tex. 21, [133 S. W. 426]: "The question always is: What is the contract? Is it that one act shall be done, with a sum annexed, whether by way of penalty or damages, to secure the performance of the contract? Or is it that one or two things shall be done at the election of the party who has to perform the contract, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penal or other like sum being annexed will not prevent the court enforcing the performance of the very act, and thus carrying into execution the intention of the parties. If the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for proceeding against the party having the election to compel the performance of the other alternative." (See, also, Fry on Specific Performance, sec. 115; 36 Cyc. 571, 572.)

[6] While the proposed agreement here does not directly or in so many words provide that the proposed buyer may refuse to carry out and complete the contract, the language of the instrument necessarily implies as much, and thus would as clearly and effectually vest that right in the proposed purchaser as if it were directly expressed. If signed by the Ritchies, it would give to the buyer the choice of two alternatives, namely: Either to purchase the property on the terms stated or refuse to complete the purchase and so forfeit to the sellers the sum of one hundred dollars fixed in the contract as the damages for such noncompliance. This construction necessarily follows from the provision that the proposed vendee might refuse to purchase the property, notwithstanding that the title to the same was found to be valid or merchantable, the provision for liquidated damages in the sum of one hundred dollars to be forfeited to the sellers in the event of the refusal by the proposed purchaser to carry out his part of the contract, and the provision that upon the happening of the contingencies named "this contract shall become null and void." No other language was necessary to be added to that covenant of the agreement to make it any clearer than it is that the intention of Arnsburger as therein expressed was to reserve to himself the right of election to

buy or not to buy the property in any event, in case the instrument had been signed by the Ritchies.

[7] Clearly, therefore, the instrument was one of those contracts looking to the sale and purchase of real property which are incapable of specific enforcement. It would be, if signed by the Ritchies, wanting in that mutuality between the parties which must be shown to exist in such contracts before their specific performance by the parties thereto can be decreed. Indeed, if, upon the happening of the contingencies named, the "contract shall become null and void," how could the instrument be specifically enforced after the happening of those contingencies? Obviously, if the contingencies happened which would render the agreement "null and void," there could then be no agreement to enforce.

It would seem unnecessary to cite authorities to support the above proposition, but agreements similar to the one here have been considered by courts of other jurisdictions and held not to be subject to specific performance. Some of the cases it will do no harm to refer to herein.

In *Crum v. Slade & Bassett*, (Tex. Civ.), 154 S. W. 351, which was an action to recover commissions for the sale of real property, the agreement provided for the payment to the seller of the sum of two thousand dollars, "as part of the cash payment, to be forfeited to the seller in the event the buyer upon approval of the title to said lands, after being furnished abstracts and deeds, as aforesaid, fails or refuses to perform his part of this contract. . . . In the event the buyer forfeits the two thousand dollars paid and the contract is thereby *at an end* (italics ours) that said sum is to be divided" between the seller and the brokers negotiating the sale in certain specified proportions. The court of civil appeals of Texas held that the language quoted, particularly that which we have put in italics, clearly indicated an intention to vest the purchaser with the right either to carry out the agreement or refuse to do so at the expense of the forfeiture of the cash money paid down on the execution of the agreement by the seller, and accordingly ruled that the agreement amounted to no more than an option, incapable of specific enforcement.

Similarly, it was held by the same court, in *Simpson v. Eardley* (Tex. Civ.), 137 S. W. 378 (in which a writ of error

was denied by the supreme court of Texas), as to an agreement procured by a broker for the sale of certain real estate, which provided, *inter alia*, that "should said title be approved by the attorneys for the parties of the second part, and they fail or refuse to comply with the terms of this contract, then said sum of one thousand dollars earnest-money (the contract providing that that sum should be paid down by the purchaser on the execution thereof by the seller), shall be forfeited to the party of the first part and treated as liquidated damages." The court in that case said: "It will be seen that by said contract Bell and Robinson did not agree to become purchasers of the land; that is to say, they did not agree to buy the land, because they expressly reserved the right not to take it and let the one thousand dollars go to defendants as a forfeit or liquidated damages. Eardley could not, upon that contract, have enforced specific performance, consequently it was not a contract of sale, binding as such on Bell and Robinson in any view, but, at their election, it was a sale or an option according to how they saw fit to treat it. . . . It is clear that defendant, in case of an arbitrary refusal on the part of Bell and Robinson to take the land, was cut off from any right to insist on performance by them, and had to take the one thousand dollars or nothing."

In *Rankin v. Grist et al.*, 61 Tex. Civ. 484, [129 S. W. 1147], and *Moss and Raley v. Wren*, 102 Tex. 567, [113 S. W. 739, 120 S. W. 847], agreements of like import were held to confer upon the proposed purchaser the right to elect between consummating the purchase and the refusal to purchase, with resultant forfeiture of money to be paid down on the execution of the agreements by the proposed sellers. In both said cases it was held that the agreements could not be specifically enforced.

It is, of course, very clear from the foregoing views and conclusion that the plaintiff did not procure in Arnsburger a purchaser of the land mentioned in the agreement able, willing, and ready to purchase upon the terms specified in the brokerage agreement or at all, and, therefore, is not entitled to the compensation provided in its agreement for its services in negotiating the sale of the property. Of course, as appellant declares, it is to be conceded to be a well-settled proposition that, where a broker, when employed merely to negotiate a sale of real estate, "has found a purchaser able,

ready, and willing to purchase upon the vendor's terms, his right to the agreed commissions is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold, nor is it contingent upon the consummation of the sale." (*Gunn v. Bank of California*, 99 Cal. 349, [33 Pac. 1105].) And it is equally true that where the broker procures a party able to purchase the property upon the vendor's terms and is willing and ready to do so, no act of the vendor whereby the sale fails of consummation can have the effect of depriving the broker of his commissions. Even the failure of the vendor to present a good or merchantable title to the property cannot have that effect, unless there be in the brokerage contract a covenant so providing. But the broker, to be entitled to the agreed commissions, must produce a purchaser able, willing, and ready to purchase; and where, as here, he produces a proposed purchaser, who reserves to himself the right of election either to purchase or arbitrarily refuse to do so, or to refuse to purchase, even though a perfect title be shown, then the broker has not produced a purchaser ready and willing to purchase, even though he has the ability to do so. It follows that the plaintiff has not made out a case entitling it to recover as against the Ritchies.

As to the defendant, Lightner, it appears that she had disposed of her interest in the land described in the agreements, and that the Arnsburger agreement was never presented to her by the plaintiff or any other person for her signature. That she had the right to sell her interest, notwithstanding the brokerage contract with the plaintiff pending the life of said contract, is not a debatable proposition when we examine the said agreement. [8] It will be observed that, while the agreement vested in the plaintiff an exclusive agency and so made it the sole agent for the sale of the interest of the defendants in the premises for the period of thirty days, it did not confer upon the plaintiff the exclusive right to sell said interest. As the learned trial judge declared in his opinion: "Under such conditions, the defendants, collectively or individually, might, pending the period of the agency and before the broker had secured a purchaser or a valid agreement from a proposed purchaser willing and able to make the purchase according to the authorization to sell previously executed, sell or make sale without becoming liable for com-

missions." The proposition as thus stated is sustained by many cases, notable among which are *Dreyfus v. Richardson*, 20 Cal. App. 800, [130 Pac. 161], and *Snook v. Page*, 29 Cal. App. 246, [155 Pac. 107]. It results that, under the circumstances as disclosed here as to the defendant, Lightner, she could in no event be held liable to the plaintiff for commissions for procuring a purchaser of her interest.

Agreeably to the views herein set forth, the judgment appealed from is affirmed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 2847. First Appellate District, Division One.—March 13, 1919.]

MARIN MUNICIPAL WATER DISTRICT (a Public Corporation), Appellant, v. NORTH COAST WATER COMPANY, Respondent.

- [1] **EMINENT DOMAIN—ENCUMBRANCES—IMPLIED COVENANTS.**—Where property is taken by a proceeding in eminent domain, there is no implied covenant, as in a voluntary conveyance by grant, against encumbrances or liens.
- [2] **ID.—PAYMENT OF LIENS—RIGHT TO DEDUCT FROM JUDGMENT—CONSTRUCTION OF SECTION 1248, CODE OF CIVIL PROCEDURE.**—Section 1248 of the Code of Civil Procedure gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid.
- [3] **ID.—PAYMENT IN FULL TO OWNER—RIGHT OF RECOVERY.**—Section 1712 of the Civil Code does not give such a right of recovery where the person taking property by proceedings in eminent domain has paid the full purchase price to the owner of the land.
- [4] **ID.—CONDEMNATION OF LAND SUBJECT TO TAX—DUTY OF OWNER TO PAY.**—Where a municipal water district condemns certain land and, pursuant to proceedings had in accordance with section 1254 of the Code of Civil Procedure, is let into possession thereof, there is no obligation on the part of the owner to pay the taxes which are due and a lien on the land, but not delinquent, at the time of the transfer.

APPEAL from a judgment of the Superior Court of Marin County, Edgar T. Zook, Judge. Affirmed.

The facts are stated in the opinion of the court.

George H. Harlan for Appellant.

Charles S. Wheeler, John F. Bowie and Nathan Moran, for Respondent.

RICHARDS, J.—In this action the plaintiff sought to recover from the defendant the sum of \$2,224.57, which it had paid as county and municipal taxes upon certain real property situated in the county of Marin. The complaint set forth certain facts in an attempt to show that it was the duty of the defendant to have paid these taxes, and that it not having done so, the plaintiff, in order to free its property from the lien thereof, was compelled to and did pay them. A general demurrer to the complaint was sustained without leave to amend, and the plaintiff appeals from the judgment thereupon entered.

It appears from the complaint that the plaintiff is a municipal water district. As such it brought an action to condemn certain lands of the defendant. It had theretofore procured a valuation of said lands to be made by the railroad commission, which fixed such valuation at the sum of \$289,100. The action was tried on February 14, 1916, and resulted in a judgment, entered on March 21st following, that the plaintiff take said lands upon paying the said sum of \$289,100, from which judgment the defendant took an appeal.

On or about the first Monday of March of the same year the real property was assessed by the county assessor, and a part thereof by the town assessor of Mill Valley, for taxation purposes, and in the following September county and municipal taxes were duly levied (being the taxes giving rise to the present controversy), and became a lien upon the real property referred to as of the first Monday in March, 1916. These taxes became due on October 23d of that year.

On October 24, 1916, the plaintiff, upon notice theretofore given, procured from the superior court, under the provisions of section 1254 of the Code of Civil Procedure, an order placing it in possession of the property upon payment of the

amount previously found to be its value, and a few days thereafter, to wit, on November 1st, it paid to the defendant this amount and entered into possession of the real property. At the time of the transfer neither the county nor municipal taxes had been paid, and several weeks later became delinquent, and the property was sold therefor. Thereafter the plaintiff redeemed it, and demanded of the defendant that it reimburse to it the amount so paid out, which the defendant refused to do.

The facts as above narrated disclose that at the time the plaintiff took over the real property the taxes, although due and a lien thereon, were not delinquent. There had been no default on the part of the defendant. [1] Its property being taken from it by a proceeding *in invitum*, there was no implied covenant, as in a voluntary conveyance by grant, against encumbrances or liens. Nor are we pointed to any provision of law placing upon defendant any obligation to the plaintiff to remove from the property about to be taken from it any lien existing thereon. The plaintiff claims that such obligation arises from the terms of section 1248 of the Code of Civil Procedure. That section reads as follows: "When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid."

[2] We do not so construe the section. It gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid. The right given by this section seems to be one the extent of which is measured by the mode prescribed for its exercise. In eminent domain proceedings the only obligation resting upon the defendant is to prove his damages. A case in which this question arose is *Gray v. Case*, 51 N. J. Eq. 426, [26 Atl. 805]. There the condemnor failed to provide against a lien both at the trial and after the award was paid into court. The court of chan-

cery of New Jersey used this language with regard to the situation thereby created: "But the company failing to give the requisite notice it still had the right to have equitable distribution of the award among those interested. For this purpose it was entitled to the aid of the court (*Platt v. Bright*, 29 N. J. Eq. 128; *Id.*, 31 N. J. Eq. 81). This too was neglected by the company. Parties who fail to avail themselves of the rights and safeguards which the law offers them cannot complain when such failure results in their disadvantage."

Plaintiff also claims in support of its right to recover that the case comes within the provisions of section 1712 of the Civil Code, reading: "One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides." [3] Obviously this section is entirely foreign to the matter in hand.

[4] We are of the opinion that the facts set out in the complaint fail to show any obligation on the part of the defendant to have removed the lien of the taxes at the time of the transfer of the land to the plaintiff; and that, there being no such covenant or duty, there could be no liability created either by the fact that the defendant did not pay such taxes or that the plaintiff did pay the same.

It follows that the trial court correctly held that the complaint stated no cause of action.

The judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 12, 1919.

All the Justices concurred.

[Civ. No. 2628. Second Appellate District, Division One.—March 13, 1919.]

LOUISE E. REHNERT, Appellant, v. P. E. BEAM, Respondent.

- [1] **CONTRACTS—CONSTRUCTION OF ALTERNATIVE PROMISE—PRIMARY OBLIGATION TO PAY MONEY.**—Where a person agrees to repay to another, on or before a given date, a stated sum of money which has been previously advanced, or in lieu thereof to deliver to said person a given number of shares of the capital stock in a certain corporation thereafter to be formed, the principal obligation is to pay such sum of money, subject to the proviso that said person might relieve himself from such payment by delivering the shares of stock on or before the given date, and upon his failure to pay the money or exercise his option to deliver the stock in lieu thereof, within the time limited, the other is entitled to maintain an action to recover the money.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Gibson & Woolner and Davis, Kemp & Post for Appellant.

E. R. Young for Respondent.

CONREY, P. J.—Action to recover money alleged to be due on a written contract. Judgment was entered in favor of the defendant. The plaintiff appeals from the judgment and from an order denying her motion for a new trial.

It is conceded by counsel on both sides that the only point involved in the case turns upon the construction of the contract. The stipulations of the contract are as follows:

“Whereas, Said second party agreed to advance to said first party the sum of ten thousand (\$10,000.00) dollars to be used in perfecting certain inventions and the construction of certain machines, and in consideration therefor the said first party agreed to deliver to said second party a part of the capital stock of a corporation thereafter to be formed; and

“Whereas, Said second party has advanced to said first party the sum of forty-five hundred (\$4500.00) dollars, and no more;

"Now, therefore, it is hereby agreed: That said first party shall repay to said party of the second part the said sum of forty-five hundred (\$4500.00) dollars and five hundred (\$500.00) dollars for the use thereof, on or before the 1st day of April, 1914, or in lieu thereof, shall deliver to said second party forty-five hundred (4500) shares of the capital stock of the Refrigeration Plants Mfg. Co., hereafter to be formed, par value of stock to be ten (\$10.00) dollars per share, by said first party, as agreed. In the event that said first party pays to said second party the said forty-five hundred (\$4500.00) dollars and said five hundred (\$500.00) dollars on or before April 1, 1914, then said first party shall be relieved from any obligation to deliver to said second party any of the capital stock of said Refrigeration Plants Mfg. Co. and said second party shall not be entitled to any stock in said company.

"In witness whereof, the parties hereto have hereunto set their hands and seals, this 20th day of August, 1913."

The contract was in form between the defendant and one R. E. Starkweather. Starkweather afterward assigned the contract to the plaintiff. In entering into said agreement Starkweather was in fact acting for and on behalf of the plaintiff and as her agent, and any money to be paid under the agreement or any stock to be delivered was at all times the money and property of the plaintiff. The court below held that by virtue of said contract the defendant did not agree to pay the sum of five thousand dollars on or before April 1, 1914, or at any other time, but held, on the contrary, that the obligation was to deliver four thousand five hundred shares of stock, subject merely to defendant's option to relieve himself from the delivery of the stock by paying five thousand dollars on or before the first day of April, 1914. Appellant claims that the principal obligation was to pay the sum of five thousand dollars, subject to the proviso that the defendant might relieve himself from such payment by delivering four thousand five hundred shares of stock on or before said first day of April. [1] The true meaning of the contract, in our opinion, is according to the latter contention. If the terms of the contract had been that the defendant agreed, on or before the date named, to deliver four thousand five hundred shares of the capital stock or in lieu thereof, within that time, to pay the sum of four thousand five hun-

dred dollars, then, upon failure of the defendant to do either of those things within the time limited, the action very properly would have been for recovery of the stock or damages for the breach of that agreement; and in that event the damages would not necessarily have been limited by the sum specified in the agreement, but that specification would have applied only as the definition of the amount which defendant would have the option to pay on or before the first day of April. But in the contract, as written, the primary agreement is to pay the money. As within the time limited the defendant did not pay that money or exercise his option to deliver stock in lieu thereof, it seems very plain that the plaintiff is entitled to recover the amount demanded.

The judgment and order are reversed.

Shaw, J., and James, J., concurred.

[Civ. No. 2071. Second Appellate District, Division Two.—March 13, 1919.]

WHITING-MEAD COMMERCIAL COMPANY OF SAN
DIEGO (a Corporation), et al., Appellants, v. NELLIE
D. RICHARDS et al., Respondents.

[1] APPEAL—ALTERNATIVE METHOD—INSUFFICIENT RECORD.—Where an appeal is by the alternative method, and on the clerk's transcript alone, and the appellant neither prints any of the record in its briefs nor designates in any way the parts of the transcript upon which its alleged statement of facts is based, the briefs will not be considered.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles B. McCoy for Appellants.

Binnard & Macomber for Respondent Nellie D. Richards.

THOMAS, J.—This is an appeal by all the above-named plaintiffs, except G. S. Umpleby, who has dismissed the appeal, so far as his interests are concerned, from an amended judgment entered on February 9, 1916, in which the trial court found that the interest of Nellie D. Richards in certain land was not subject to certain liens, etc.

The appeal is by the alternative method, and on the clerk's transcript alone.

[1] The exact condition of the record here is, as was said in the case of *Welk v. Sorensen et al.*, 179 Cal. 604, [178 Pac. 498]; "Appellant neither prints any of the record in the brief, nor designates in any way the parts of the transcript upon which the alleged 'Statement of Facts' is based. We will not, therefore, consider the brief."

By virtue of the rule followed in that case this court will not consider the briefs here.

Judgment affirmed.

Finlayson, P. J., and Sloane, J., concurred.

[Civ. No. 2870. Second Appellate District, Division Two.—March 13, 1919.]

W. C. DORRIS, Respondent, v. JAMES McKAMY et al.,
Appellants.

- [1] **APPEAL—ORDER DENYING NEW TRIAL—DISMISSAL.**—An attempted appeal from an order denying a motion for a new trial must be dismissed where the notice of appeal therefrom was filed after section 963 of the Code of Civil Procedure was amended in 1915.
- [2] **PUBLIC OFFICERS — PROCEEDING FOR REMOVAL — ACCUSATION UNDER SECTION 772, PENAL CODE.**—An accusation presented under section 772 of the Penal Code is an accusation of a public offense, to wit, neglect of official duties, or misfeasance in office, the proceeding being criminal, and, in its nature, a prosecution for crime, the penalty wherefor is removal from office, and a fine of five hundred dollars that goes to the informer.
- [3] **ID.—INSUFFICIENT ACCUSATION—WANT OF JURISDICTION.**—If an accusation filed against a public officer under section 772 of the Penal Code wholly fails to state a case sufficient to constitute an offense

under the criminal law of the state, the court is without jurisdiction, and the sentence or judgment is void, and subject to collateral attack.

- [4] **ID.—OFFENSE NOT CHARGED IN ACCUSATION.**—An accusation by a private citizen against a city marshal, filed pursuant to section 772 of the Penal Code, for neglect in the performance of official duty, fails to state facts constituting an offense known to the criminal law of this state, where it is alleged that he failed to cause the arrest or prosecution of women whom he knew were occupying and living in houses of prostitution openly and notoriously, and dressing and conducting themselves in a vile and indecent manner, no warrant for their arrest having been delivered to him, and the crime not having been committed in his presence.
- [5] **ID.—REMOVAL OF PEACE OFFICER—FAILURE TO ARREST FOR MISDEMEANOR—ESSENTIAL FACTS.**—Where it is sought to remove a peace officer from his office upon the ground that he "has refused or neglected to perform the official duties pertaining to his office," in that he has refused or neglected to arrest, for a crime amounting to a misdemeanor only, some person whom, it is claimed, it was his duty to arrest—no warrant for such arrest having been issued—two things are essential: (1) That the person whom it is claimed should have been arrested committed or attempted to commit a misdemeanor; and (2) that the misdemeanor was committed or attempted to be committed in the officer's presence.
- [6] **ID.—CHARGE THAT OFFICER "PERMITS" COMMISSION OF MISDEMEANORS—AFFIRMATIVE ACTS NOT IMPLIED.**—An allegation in an accusation by a private citizen whereby it is sought to remove a city marshal from office, pursuant to the provision of section 772 of the Penal Code, that such officer "permits" certain persons to commit certain alleged misdemeanors, amounts to no more than that having received no warrant issued upon a complaint sworn to by some person moved thereto by a proper sense of civic duty, and not having seen "committed in his presence" any acts sufficient to constitute any of the offenses denounced by the Penal Code, he made no arrests.

APPEAL from a judgment of the Superior Court of Kern County. Milton T. Farmer, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Matthew S. Platz for Appellants.

Alfred Siemon for Respondent.

FINLAYSON, P. J.—This is a creditor's suit to set aside a conveyance, executed by defendant McKamy to defendant

Keester, alleged to have been made with intent to hinder and delay plaintiff in collecting a judgment for five hundred dollars that had been given and made in his favor against McKamy in a proceeding under section 772 of the Penal Code to oust the latter from his office of city marshal of the city of Bakersfield—a proceeding wherein plaintiff here was the informer. From a judgment in favor of plaintiff adjudging that the conveyance to Keester was fraudulent and void and setting it aside, and likewise from an order denying their motion for a new trial, defendants have appealed.

[1] Notice of appeal from the order denying the motion for a new trial having been filed after section 963 of the Code of Civil Procedure had been amended in 1915, [Stats. 1915, p. 209], the attempted appeal therefrom must be dismissed.

Respondent's right to the relief he here seeks depends upon whether he is a judgment creditor of McKamy, the grantor in the conveyance sought to be set aside. Whether he is such a creditor, or even a general creditor of McKamy, depends upon the validity of the judgment in the ouster proceeding, wherein the superior court of Kern County adjudged that McKamy be deprived of his office as city marshal of Bakersfield and that the informer, W. C. Dorris, the respondent here, recover of and from McKamy the sum of five hundred dollars.

Section 772 of the Penal Code authorizes the superior court to entertain an accusation made under oath by a private citizen against an official within its jurisdiction, charging him with having collected illegal fees or with having refused or neglected to perform the official duties pertaining to his office; and on conviction the court must enter a decree that the accused be deprived of his office, and give judgment for five hundred dollars in favor of the informer. [2] An accusation presented under this section of the Penal Code is an accusation of a public offense, to wit, neglect of official duties, or misfeasance in office. The proceeding is a criminal proceeding, and, in its nature, a prosecution for crime, the penalty wherefor is removal from office and a fine of five hundred dollars that goes to the informer. (*In re Curtis*, 108 Cal. 661, [41 Pac. 793]; *Wheeler v. Donnell*, 110 Cal. 655, [43 Pac. 1]; *People v. McKamy*, 168 Cal. 531, [143 Pac. 752].)

[3] If the verified accusation against McKamy wholly failed to state a case sufficient to constitute an offense under

the criminal law of the state, the court was without jurisdiction in the proceeding to oust him from office, and the judgment for five hundred dollars in favor of the respondent here—a *sine qua non* to his right to the relief here sought by him—was a nullity.

Courts derive their jurisdiction from the law. In criminal cases their jurisdiction extends to such matters as the law has declared criminal, and none other; and when they undertake to punish for an offense to which no criminality attaches, however reprehensible such offense may be *in foro conscientiae*, they act beyond their jurisdiction. (*In re Corryell*, 22 Cal. 178.) Hence the rule is that if an indictment, information, or written accusation—the very groundwork of the whole superstructure thereafter to be built thereon—charges or purports to charge acts which do not constitute any crime known to the law, the court is without jurisdiction, and the sentence or judgment is subject to collateral attack, as, for instance, in a *habeas corpus* proceeding. (*In re Corryell*, *supra*; *Ex parte Harrold*, 47 Cal. 129; *Ex parte Kearny*, 55 Cal. 212; *In re Kowalsky*, 73 Cal. 121, [14 Pac. 399]; *Ex parte McNulty*, 77 Cal. 164, [11 Am. St. Rep. 257, 19 Pac. 237]; *Ex parte Goldman*, 7 Cal. Unrep. 254, [88 Pac. 819]; *Hutton v. Superior Court*, 147 Cal. 156, [81 Pac. 409]; *In re Worthington*, 21 Cal. App. 497, [132 Pac. 82]; *In re Wilson*, 30 Cal. App. 567, [158 Pac. 1050]; *Siebe v. Superior Court*, 114 Cal. 551, [46 Pac. 456]; *Ferguson v. Superior Court*, 26 Cal. App. 554, [147 Pac. 603]; *Ex parte Neet*, 157 Mo. 527, [80 Am. St. Rep. 638, 57 S. W. 1025]; *Ex parte Show*, 4 Okl. Cr. 416, [113 Pac. 1062]; *Ex parte Beall*, 28 Okl. 445, [114 Pac. 724]; *Ex parte Roquemore*, 60 Tex. Cr. 282, [32 L. R. A. (N. S.) 1186, 131 S. W. 1101].) In *Siebe v. Superior Court*, *supra*, speaking of an accusation filed under section 772 of the Penal Code, the court said: “. . . and unless the accusation charges the officer with a violation of his official duties in respect to one or the other of these particulars, *the court has no jurisdiction in the matter.*” (The italics are ours.) In *Ex parte Harrold*, 47 Cal. 129, the petitioner for the writ of *habeas corpus* had been tried and found guilty as alleged in an indictment charging him with “willfully omitting as a public officer to perform a duty enjoined by law upon him.” It was charged in the indictment that he had failed to reside at the county seat. It was contended by the attorney-

general that this was a "willful omission to perform a duty enjoined by law upon a public officer," within the meaning of section 176 of the Penal Code. It was held that the failure to reside at the county seat was not an "omission to perform any duty enjoined by law upon a public officer," and that, therefore, the indictment did not charge any offense. Because the facts set forth in the indictment did not constitute any crime known to the law, it was held that the petitioner was entitled to his discharge. In *Ferguson v. Superior Court*, 26 Cal. App. 554, [147 Pac. 603], it was held that if an accusation under section 772 of the Penal Code does not state facts sufficient to constitute a ground for the officer's removal, the court is without jurisdiction to entertain the proceeding, and the officer is entitled to a writ of prohibition restraining the trial court from proceeding further in the matter. The rule is clearly and concisely stated by the Montana supreme court as follows: "If an information states facts which do not constitute any crime known to the law, or undertakes to state such an offense, but the facts stated do not constitute the offense, and no addition to them, however full and complete, can supply what is essential, then the court is without jurisdiction to put the complainant on trial. In such case the judgment cannot be corrected. It is simply void." (*In re Farrell*, 36 Mont. 254, [92 Pac. 785].) In *Ex parte Ruef*, 150 Cal. 665, [89 Pac. 605], the court, recognizing a distinction between proceedings in courts of inferior as distinguished from courts of general jurisdiction, held that, where the criminal proceeding is one pending in a court of general jurisdiction and the indictment or information purports or attempts to state an offense of a kind of which the court has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on a collateral attack. As we understand this statement of the rule, it amounts practically to this: If it can be deduced from the accusation that the prosecutor intended to charge an act or an omission which is a crime known to the law, the court has jurisdiction and *habeas corpus* will not lie, however defectively the act or omission be described. But if the act or omission charged or attempted to be charged as an offense is not a crime known to the law, then the court is without jurisdiction, and its judgment a nullity. We think the only conclusion that is consistent with the weight of authority and the

decisions of our own supreme court is that if the accusation filed against McKamy states facts which do not constitute any crime known to the law of this state, the court was without jurisdiction, and its judgment void.

Did the accusation state facts that constitute any offense known to the criminal law of this state? [4] We think not. It did not differ in any material respect from that held to be insufficient in *Ferguson v. Superior Court*, 26 Cal. App. 554, [147 Pac. 603].

The written accusation presented to the superior court for McKamy's removal from office alleges that, at the times therein mentioned, he was the city marshal of Bakersfield; that in that city there was at that time a large number of women living in houses of prostitution or cribs, maintaining or keeping said places as disorderly houses or houses of ill-fame; that such houses had been resorted to by divers and sundry persons for the purposes of prostitution; and that such women kept such places as houses of ill-fame for the purposes of prostitution. Then follows, in paragraph III, a description of the houses or cribs, and the allegation that "such places have been erected, maintained, leased, and let" for the purposes of prostitution and lewdness, and that "the occupancy and living in said houses" by said women "has been open and notorious," and that the women in said places "dress and conduct themselves in a vile and indecent manner, as follows: That said women and girls will leave said cribs and solicit, entice, and invite those passing thereby to visit them therein for the purposes of prostitution and lewdness." Then follows paragraph IV, which is as follows: "That during all of the times above mentioned, said defendant James McKamy has had knowledge of the fact that said women were doing the things and performing the acts as in the paragraph last hereinbefore alleged [i. e., the third paragraph], and that he has failed, refused, and neglected, and still fails, refuses, and neglects to cause the arrest or prosecution of the said women, or any of them, for said acts, but permits them to occupy the said cribs as hereinabove alleged, without molestation or force against them."

Nowhere in the accusation is it alleged, nor is it even claimed, that any warrant was ever delivered to McKamy for the arrest of any of the persons referred to in the accusation. The offenses which the accusation attempts to allege were

committed by the women whom McKamy failed to arrest were misdemeanors only. (Pen. Code, secs. 315, 316, 318.)

In *Ferguson v. Superior Court*, 26 Cal. App. 554, [147 Pac. 603], it is held that where the only special charges of neglect on the part of the officer to perform his official duties are, first, his failure "to cause the prosecution or the arrest of any persons letting cribs for the purposes of prostitution," and second, his failure to cause the prosecution or arrest of "any of the persons residing therein," the accusation fails to state facts sufficient to constitute a ground for the officer's removal. It was held in that case that the accusation was insufficient to give the court jurisdiction to remove the officer, even though it alleged that he had knowledge of all the facts respecting such letting of the cribs and residence therein; and that, while the code provides that in prosecutions for keeping a house of prostitution, common repute may be received as independent evidence of the character of the house and the women resorting to it, the failure of a peace officer to act upon such common repute in arresting the keeper or the inmates thereof does not constitute a neglect of official duty, although it might excuse such action if he did arrest them.

[5] Where, as in the accusation in question here, it is sought to remove a peace officer from his office upon the ground that he "has refused or neglected to perform the official duties pertaining to his office," in that he has refused or neglected to arrest, for a crime amounting to a misdemeanor only, some person whom, it is claimed, it was his duty to arrest—no warrant for such arrest having been issued—two things are essential: (1) That the person whom it is claimed should have been arrested committed or attempted to commit a misdemeanor; and (2) that the misdemeanor was committed or attempted to be committed in the officer's presence. A peace officer has authority to make an arrest for a misdemeanor only when he is armed with a warrant or the crime is committed in his presence. (Pen. Code, sec. 836.)

The accusation against McKamy fails to allege, not only that any warrant had been delivered to him, but that any of the women had committed, in his presence, any act sufficient to constitute any offense denounced by any Penal Code section to which our attention has been called. The charge in the accusation is that McKamy "has had knowledge of the

fact that said women were doing the things and performing the acts as in the paragraph last hereinbefore alleged," i. e., paragraph III. The only acts that paragraph III alleges were committed by the women are: 1. Occupying and living in said houses of prostitution openly and notoriously; and 2, Dressing and conducting themselves "in a vile and indecent manner, as follows: That said women and girls will leave said cribs and solicit, entice, and invite those passing thereby to visit them therein for the purposes of prostitution and lewdness." It is not alleged that the women "willfully" lived in or occupied the houses, though the language of section 315 of the Penal Code is that "Every person who . . . willfully resides in such house, is guilty of a misdemeanor." As to the alleged soliciting and enticing, it is not alleged that any unmarried female was enticed—the crime denounced by section 266 of the Penal Code—nor that, by reason of such soliciting, enticing, or inviting, any person was "prevailed upon" to visit the room of any of the lewd women—the offense denounced by section 318 of the Penal Code. Our attention has not been called to any other code section making it an offense to solicit, entice, or invite.

An analysis of the language of the accusation whereby it was sought to deprive McKamy of his office discloses that the alleged neglect of official duty with which he was charged was not stated so strongly as in the similar case against Ferguson—the petitioner for the writ in *Ferguson v. Superior Court*, 26 Cal. App. 554, [147 Pac. 603]. For the reasons set forth in that case, with which we agree, we hold that the accusation against McKamy did not state facts sufficient to give the court jurisdiction to punish him by depriving him of his office and adjudging that he pay a fine of five hundred dollars to the informer, the plaintiff in this action.

Respondent seeks to differentiate the accusation here in question from that presented against Ferguson by arguing that the accusation against McKamy alleges that he "permits" the women "to occupy said cribs as hereinbefore alleged." The word "permit" is a word of considerable elasticity; it lacks clearcut and precise definiteness. As defined by Webster and others, "permit" implies no affirmative act. It involves no intent. It is mere passivity, abstaining from preventative action. (*In re Thomas*, 103 Fed. 272, 274.) [6] An allegation that McKamy "permits" the women to occupy

the cribs amounts to no more than that having received no warrant issued upon a complaint sworn to by some person moved thereto by a proper sense of civic duty, and not having seen, "committed in his presence," any acts sufficient to constitute any of the offenses denounced by the Penal Code, he made no arrests.

While, in the light of the facts alleged in the accusation, McKamy's failure to swear to a complaint, as any private citizen might have done, indicates a lack of appreciation of the duties that devolve upon every decent citizen having knowledge of facts sufficient to justify the honest belief that misdemeanors have been committed, nevertheless, as was said in the Ferguson case, "We cannot subscribe to the proposition that the failure of an officer, without process, to make an arrest under such circumstances, or to swear to a complaint and cause the prosecution of the offenders, constitutes a misdemeanor, to wit, neglect of official duties, for which he may be removed from office. Under such circumstances, to subject him to a prosecution under the provisions of section 772 of the Penal Code, at the relation of one seeking to recover the five hundred dollar penalty provided therein, would not only impose unnecessary and intolerable burdens, but strip him of all discretion in the making of arrests for misdemeanors, and require him at his peril to make arrests of vagrants, prostitutes, and inmates of houses of prostitution upon common repute or information."

The accusation here in question is not simply a case where the document has been inartificially drawn, or a case where it intimates the existence of facts necessary to the constitution of the offense denounced by section 772 of the Penal Code, or even an attempted statement, insufficient, but indicating a purpose to declare on the essential facts. There is here a total failure to allege any offense for which McKamy may be punished by removal from office; and that the court was without jurisdiction and the judgment a nullity is the only conclusion that accords with such cases as *Ex parte Harrold*, 47 Cal. 129; *Siebe v. Superior Court*, 114 Cal. 551, [46 Pac. 456], and *Ferguson v. Superior Court*, 26 Cal. App. 554, [147 Pac. 603]. Tested by the rulings in those cases, the accusation was not merely defective, or technically insufficient, not merely demurrable or subject to a motion to quash, but, in the language of *Ex parte Show*, 4 Okl. Cr. 416, [113 Pac. 1062], "it was

elementally and fundamentally defective in substance, so that it charged a crime in no manner or form and by no intentment."

For these reasons we hold that respondent never was a creditor of McKamy.

Other points are made, but what has been said is sufficient to dispose of the appeal.

The appeal from the order denying the motion for a new trial is dismissed.

Judgment reversed.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 2744. First Appellate District, Division Two.—March 14, 1916.]

**THE NATIONAL BANK OF SAN MATEO (a Corporation),
Appellant, v. LESLIE D. WHITNEY, Respondent.**

- [1] **BANKS AND BANKING—SIGNING OF BLANK NOTE—COMPLETION BY CASHIER—AGENCY.**—Where a depositor signs a blank promissory note and turns it over to the cashier of the bank with directions to fill it in and credit the proceeds to a given account upon receiving certain instructions, and such cashier thereafter, without having received the instructions, fills in the blanks in the note, he acts as the agent of such depositor and not of the bank.
- [2] **ID.—LEGAL POSITION OF PARTIES.**—When such note was filled in by the cashier, the legal position of the parties was exactly the same as if the depositor himself, on the date the note was filled in, had taken or sent to the bank a completely filled and signed note.
- [3] **ID.—ABSTRACTION OF FUNDS BY CASHIER—LOSS.**—If a depositor hands his promissory note to the cashier of the bank with instructions to charge the same to his personal account and credit the proceeds to the account of a given company, and such cashier charges the note to the personal account of such depositor and abstracts the amount of the note from the bank's funds, the loss will fall on the bank.
- [4] **ID.—DEPOSIT OF NOTE—DELIVERY—ACCEPTANCE.**—If a depositor manually delivers his note to a bank, there is no delivery within the meaning of the law until the bank, or someone acting for it, takes affirmative action, which may be a mere oral consent to advance the

money represented by the note, the entry of the note in the books of the bank and the transfer of proper credit, or perhaps some other act; but, until the affirmative act is taken, there is no acceptance of delivery by the bank.

- [5] **ID.—DISREGARD OF PRESCRIBED CONDITIONS — DELIVERY.**—If conditions prescribed by such depositor are fraudulently disregarded by the bank, or its agent, there is no delivery binding the maker, there being no meeting of minds.
- [6] **ID.—ABSTRACTION OF FUNDS BY CASHIER — CAUSE OF PREJUDICE.**—Where the cashier placed the note in the bank's files and caused it to be charged to the account of the depositor and then abstracted the amount of the note from the bank's funds, the prejudice suffered by the bank was by reason of the theft by such cashier, and not by reason of the note.
- [7] **ID.—CONSIDERATION FOR NOTE — PRESUMPTION — BENEFITS.**—The presumption of consideration because a note is written cannot overcome direct evidence that neither the depositor nor the company to whom he had directed that the proceeds be credited received any benefit from the transaction.
- [8] **PRINCIPAL AND AGENT — MISAPPLICATION OF FUNDS — LIABILITY OF PRINCIPAL—EXCEPTION TO RULE.**—The rule that where one trusts another with commercial paper, either signed or unsigned, and the person trusted misapplies the funds received for such commercial paper, the loss falls on the trustor, because the wrongdoer is his agent, does not apply where such agent subsequently gets possession of the money of another principal.
- [9] **FINDINGS—CONCLUSION OF LAW—HARMLESS ERROR.**—In an action to recover upon a promissory note, a finding "that no part of the principal sum or the interest on said promissory note is due or owing" is a conclusion of law, but where there was no delivery of, nor consideration for, the note, the finding is not prejudicial.
- [10] **ID.—CONSTRUCTION OF.**—Findings must be construed together to uphold the judgment entered upon them.
- [11] **ESTOPPEL—INNOCENT PARTIES—ACTS OF THIRD—LIABILITY.**—The rule that where one of two innocent parties must suffer by the acts of a third, the loss must fall upon the first negligent actor, can have no application where a depositor of a bank delivers to the cashier his promissory note, with instructions to charge the same to his account and credit the proceeds to a given company, and such cashier, after depositing the note in the bank's files, abstracts the amount of the note from the bank's funds.
- [12] **PRINCIPAL AND AGENT—KNOWLEDGE OF AGENT—IMPUTED TO PRINCIPAL.**—The rule that where an agent receives notice, it is not imputed to the principal if the agent is engaged in committing an independent fraudulent act upon his own account, is subject to the

exception that where the agent is the sole representative of the principal in the transaction, and does not deal with the principal, or with any other agent acting for him, the general law of agency is still applicable, and the knowledge of the agent is imputed to the principal.

[13] **APPEAL — AFFIRMATIVE DEFENSE — FAILURE TO FIND UPON — REVERSAL OF JUDGMENT.**—A judgment will not be reversed for failure to find upon an affirmative defense if the record does not show that evidence was introduced in support thereof, or where the evidence introduced was not sufficient to support a finding in favor thereof, if such finding had been made.

[14] **ID.—ERROR—INJURY.**—Upon appeal, it is incumbent upon the appellant to show not alone error, but injury from error.

APPEAL from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge. Affirmed.

The facts are stated in the opinion of the court.

Walter H. Linforth and Ross & Ross for Appellant.

Norman A. Eisner for Respondent.

HAVEN, J.—This suit was to recover three thousand dollars on an instrument, in form a promissory note, dated July 14, 1915, and signed by the defendant. Defendant denied the execution of the note and the debt, and in a separate defense and by way of cross-complaint alleged facts to which further reference is made in this opinion, and which were claimed to constitute a complete defense to the action.

The judgment was in favor of the defendant. On this appeal by plaintiff numerous contentions are made, for an understanding of which it is necessary to state the facts disclosed by the evidence.

The Leslie Salt Refining Company was a corporation of which Leslie D. Whitney was the president, his brother St. John Whitney was a member of its board of directors and business manager, and W. M. Roberts was a stockholder and a director. Roberts was also the cashier of the plaintiff bank. The Salt Company and Leslie D. Whitney were both customers of the plaintiff bank, and had been frequent borrowers for at least five years prior to July 1, 1915. All of the dealings of the defendant, both individually and on behalf of the Salt Company, with the bank had been carried on with Roberts as

cashier. On June 30, 1915, the defendant, Leslie D. Whitney, who was about to enter a hospital for treatment, visited the bank and explained to Roberts that the Salt Company might shortly thereafter require accommodation, and since its bank loans were already close to its margin of credit, he, Whitney, desired to leave in the hands of Roberts a blank note to be filled in by Roberts upon the order of his brother or himself, then to be charged to his personal account, and the proceeds to be applied to the credit of the Salt Company. Under these conditions he signed the blank note and left it with Roberts. On the same day he went to the hospital, where he remained for some weeks. On July 14, 1915, without having received instructions from either of the Whitneys, Roberts filled in the blanks of the note over the name of Whitney for three thousand dollars. [1] Roberts was clearly acting as the agent of Whitney and in violation of his trust in filling in the note, but so long as it remained in his possession, no one was injured by his action. [2] When the note was filled in by Roberts the legal position of the parties was exactly the same as if Whitney himself, on July 14, 1915, had taken or sent to the bank a completely filled and signed note in the words of the instrument in suit. [3] If on that day Whitney had handed the note to Roberts with instructions to charge the same to his personal account and to credit the proceeds to the Salt Company account, and Roberts had charged the note to the personal account and had abstracted three thousand dollars of the bank's funds, there could be no question as to the loss falling upon the appellant. With the three thousand dollar note in his possession as the agent of Whitney, Roberts did what neither Whitney himself, nor his agent, could have done. By virtue of his position as cashier of the bank, he placed the note in the bank's files, and caused it to be charged to Whitney's personal account. It is claimed by the appellant that this act on the part of Roberts constituted a delivery of the note from Whitney to the bank. It is true that there was manual tradition of the note from Roberts as Whitney's agent to the bank's papers in violation of Roberts' duty to Whitney. If Roberts' activities had terminated at that point, however, there could be no doubt that the bank could not have recovered on the note, because there was no consideration at that time passing to Whitney or suffered by the bank. All further dealings with the note and with the

bank's accounts must have been had by some employee or agent of the bank. The note being in possession of the bank, and the control of it having passed entirely from Whitney and his agent, Roberts, or some other employee of the bank, abstracted three thousand dollars of the bank's cash, the note being charged to the personal account of Whitney to hide the speculation. It was the bank's money which was stolen and not Whitney's. The bank could not have recovered on the note in its possession before the theft, and it cannot recover on the note because of the theft of its own funds by its own officer or employee. If a merchant sends his bookkeeper to his bank with a check for three thousand dollars to be deposited, and the bookkeeper delivers the check to the bank's teller with instructions to deposit the proceeds to his employer's account, and the teller destroys the deposit slip and treats the check as a cash transaction, abstracting the money and not crediting the deposit account of the merchant, the loss, of course, would fall on the bank. The principles of law applicable to this transaction are so clear that citation of authority seems unnecessary. The judgment of the lower court was in accordance with these principles. The only questions open are whether or not the contentions of the appellant in its attack upon the findings are convincing.

The lower court found that the note in suit was never made, executed, or delivered to the plaintiff by the defendant. On behalf of the appellant it is said there is no evidence to contradict the facts: (1) That the defendant signed the note; (2) that he left it with Roberts; (3) that on the date of the note and before its maturity Roberts placed the note in the possession and in the files of the plaintiff; (4) that the employees of the bank entered the note on the day of its date in regular course of business on the books of the bank; (5) that the note remained in the possession of the plaintiff until the trial. These facts correspond in detail with the statement above made. When Roberts placed the note in the files of the bank there was manual tradition, but there was no delivery in legal effect. Roberts, as the cashier of the bank, when he placed the note in the bank's files had no intention of giving either Whitney or the Salt Company credit for it. Manual tradition was not accepted by the bank in the ordinary course of business, and the delivery, without such acceptance, was not effectual at law. (8 Corpus Juris, p. 210,

sec. 340; 1 Daniels on Negotiable Instruments, sec. 63.) [4] If a customer manually delivers his note to a bank, there is no delivery within the meaning of the law until the bank, or someone acting for it, takes affirmative action, which may be a mere oral consent to advance the money represented by the note, the entry of the note in the books of the bank and the transfer of proper credit or perhaps some other act; but, until the affirmative act is taken, there is no acceptance of delivery by the bank. [5] If conditions prescribed by the maker of the note are fraudulently disregarded by the bank, or its agent, there is no delivery binding the maker, for the reason that there is no meeting of minds. In this case it is contended that when Roberts, or someone acting under his direction for the bank, charged the note against the account of Whitney, that act constituted an affirmative act necessary to complete delivery; but the record shows that while a charge was made against Whitney, credit was not given either to Whitney or to the Salt Company. Without such credit the delivery was neither complete nor binding.

It is next contended that under section 1605 of the Civil Code the bank suffered a prejudice by reason of the note, in that Roberts, the bank's cashier, obtained three thousand dollars of the bank's funds on the strength of the note, and, therefore, that the second finding that the note was without consideration is not supported by the evidence. [6] Manifestly the prejudice suffered by the bank was by reason of the theft and not by reason of the note. If another customer of the bank whose account was overdrawn had called at the bank on July 14, 1915, and handed the cashier Roberts his note for three thousand dollars, with instructions to charge him with the note and credit the proceeds to his commercial account, and Mr. Roberts had placed the note in the files of the bank, charged it to its maker, but instead of giving the customer credit, had himself abstracted the money, it could not be claimed that the maker of the note was liable thereon. This case presents the same situation.

The appellant relies upon the presumption of consideration because the note was written, and cites cases to the effect that the burden of showing a want of consideration rests upon the party seeking to avoid it. [7] The presumption cannot overcome the direct evidence in this case that neither

Whitney nor the Salt Company received any benefit from the note. (*Williams v. Hasshagen*, 166 Cal. 386, [137 Pac. 9].)

It is contended that, since Roberts was the agent of Whitney until the note passed into the possession of the bank, and since Roberts had access to the bank's cash, from which he abstracted three thousand dollars, the agent of Whitney received the proceeds of the note. The evident answer to this contention is that Roberts was not the agent of Whitney in abstracting the money from the bank nor in receiving it as a thief. [8] The large number of cases cited by the appellant simply establish the rule that where one trusts another with commercial paper, either signed or unsigned, and the person trusted misapplies the funds received for such commercial paper, the loss falls on the trustor, because the wrongdoer was at all times his agent. Where the agent subsequently gets possession of the money of another principal, as Roberts did in this case, the cases relied upon by the appellant do not apply. For instance, the appellant cites *Demarest v. Holdeman*, 34 Ind. App. 685, [73 N. E. 714], as an illuminating case. The bank in question was located at the town of Elkhart and one Kerstetter was its cashier. Finn, a depositor from the town of Goshen, handed Kerstetter two thousand nine hundred dollars to be by him deposited in the bank to Finn's credit. Kerstetter did not deposit the money. It was sought to hold the bank for Kerstetter's defalcation. The court very properly decided that Finn did not intrust the money to Kerstetter as cashier and that Kerstetter never received it as cashier, and, therefore, the bank never received it. In this case the facts are similar up to the point where Roberts placed the note in the bank's files and thereafter, solely as the bank's cashier, caused the entries to be made in the bank's books and took from the bank's cash the money to which as Whitney's agent he could have had no access.

The third finding was that no part of the principal or interest of the note had been paid and "that no part of the principal sum or the interest on said promissory note is due or owing." On behalf of the appellant it is maintained that the last clause of the finding is a conclusion of law. [9] This contention is correct, but as there was no delivery of, nor consideration for, the note, the appellant is not prejudiced by the addition of a clause which is but surplusage. [10] The findings must be construed together to uphold the judgment

entered upon them. (*Flora v. Bimini Water Co.*, 161 Cal. 495, [119 Pac. 661].)

It is further claimed that the blanket findings of the truth of the allegations of the defendant's separate defense in the cross-complaint were not supported by the evidence. The argument is based on the contention that the cashier of the bank as such had no power to make the original agreement with Whitney in regard to filling in the note and carrying it to the credit of the Salt Company when instructed by Whitney or his brother to do so, for the reason that express authority had never been given him by the bank to that end. Whitney testified that he had had similar transactions, where he had left signed blank notes with Roberts as cashier of the bank, and the bank had carried through the transactions as agreed upon between him and Roberts. This evidence was sufficient to support findings 4 and 5.

It is sought to apply the rule that where one of two innocent parties must suffer by the act of a third, the loss must fall upon the first negligent actor. [11] The analysis of the facts of this case shows that the rule has no application here. As above stated, if Whitney himself had handed his filled in and signed note to Roberts in the bank with the instruction that Roberts should charge it to his personal account and give the credit to the Salt Company, it would have been an ordinary banking transaction and would have implied no suggestion of negligence on the part of anyone. This was exactly the position on July 14th, when Roberts put into the bank's files the fully filled in and signed note. His subsequent appropriation of three thousand dollars was not because of any negligence of Whitney, but by virtue of his connection with the bank.

Many cases are cited to support the proposition that where an agent receives notice, it is not imputed to the principal if the agent is engaged in committing an independent fraudulent act upon his own account. The contention is that the bank was not chargeable with any notice of the limited purpose to which the proceeds of the note could rightfully be applied, for the reason that the knowledge of its cashier Roberts on that matter was acquired by him in furtherance of his own fraudulent plan to rob the bank. [12] The rule contended for is subject to this well-established exception: Where the agent is the sole representative of the principal in the trans-

action, and does not deal with the principal, or with any other agent acting for him, the general law of agency is still applicable, and the knowledge of the agent is imputed to the principal. In such a case it makes no difference that the agent has an opposing personal interest, or is engaged in a personal fraud against his principal. This exception to the rule is clearly recognized in the cases of *McKenney v. Ellsworth*, 165 Cal. 326, 329, [Ann. Cas. 1915B, 261, L. R. A. 1916D, 127, 132 Pac. 75], and *Williams v. Hasshagen*, 166 Cal. 386, 393, [137 Pac. 9]. The cases from other jurisdictions are collated, and the two rules contended for by the opposing parties to this action are distinguished in a note in 2 L. R. A. (N. S.) 993. (See, also, *Mechem on Agency*, 2d ed., sec. 1825.)

The facts of the instant case bring it within the exception to the rule above referred to. Roberts alone acted for the bank throughout the entire transaction. In furthering his own fraudulent designs he dealt with no representative of the bank other than himself as its cashier. Here his knowledge as such must be imputed to the bank.

It is contended on behalf of the appellant that the note was not signed in the ordinary course of business. This, too, may be conceded. The method of signing and filling in the note has nothing to do with the case. It was signed by Whitney, it was filled in by his agent, and it was not until the note passed into the files of the bank that the bank had any interest in it.

The last contention of the appellant is that the finding that the defendant had done no acts and was guilty of no omission or conduct to estop him from denying the making, execution, and delivery of the note and alleging its want of consideration, is a conclusion of law, since an estoppel is always a deduction or conclusion, and cases are cited to this effect. Cases are also cited to the proposition that it is the duty of the court to find upon all the material issues. Facts were set up in the answer to the cross-complaint from which it was claimed the defendant was estopped. The facts set up in the answer to the cross-complaint, however, were simply a detailed statement of the facts set up in the cross-complaint itself. [13] "It is well settled that a judgment will not be reversed for failure to find upon an affirmative defense, if the record does not show that evidence was introduced in support thereof, and

the same rule must obtain where the evidence introduced was not sufficient to support a finding in favor thereof if such finding had been made." (*Estate of Barclay*, 152 Cal. 753, 758, [93 Pac. 1012, 1014].) If finding 6 is not a sufficient finding of fact from the evidence, the court could only have enlarged upon the statement that the defendant had done no acts upon which the claim of estoppel could be based.

The court found that the note was never delivered and that it "was and is entirely without and unsupported by consideration." Those findings control the judgment. Others are immaterial. [14] It is incumbent upon the appellant to show not alone error, but injury from error. (*Sewell v. Price*, 164 Cal. 265, [125 Pac. 407].)

The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 12, 1919.

All the Justices concurred.

[Civ. No. 2732. First Appellate District, Division Two.—March 14, 1919.]

MARY HUGHES PATTERSON, Respondent, v. ALMOND CITY LAND AND DEVELOPMENT COMPANY (a Corporation), et al., Appellants.

- [1] APPEAL — ALTERNATIVE METHOD — INSUFFICIENT BRIEFS.—Where, upon an appeal under the alternative method, there is printed as an appendix to appellant's brief what is designated a *résumé* of the evidence of certain witnesses, and in the brief itself are certain conclusions of fact, to support which no reference is made either to the transcript or the appendix, and there is nothing printed in either brief to inform the court clearly what the issues were before the lower court, and but a single one of the findings is printed, and that in the appendix to respondent's brief, the appellate court will not examine the typewritten transcript in search of error upon which to base a reversal.

- [2] **ID.—CONFLICT OF EVIDENCE—FINDINGS.**—The appellate court cannot overturn the findings of the trial court where there is a substantial conflict of evidence upon the facts found.
- [3] **TRIALS — ABSENT WITNESS — CONTINUANCE REFUSED — HARMLESS ERROR.**—Where the parties stipulated that the evidence of an absent witness might be introduced after all other available evidence had been introduced, the trial court did not commit reversible error in refusing to grant a continuance on account of the continued absence of such witness where his testimony could have had no greater force than to import a further conflict of evidence upon an immaterial matter.
- [4] **CONTRACTS—RESCISSION—RESTORATION OF CONSIDERATION.**—Deposit in a bank, by one party to an agreement of exchange who desires to rescind the contract on the ground of fraud, of a deed of reconveyance to the other party, and notification to such other party to call for it, constitutes a sufficient notice of rescission and offer to restore the consideration.
- [5] **JUDGMENTS—ACTION TO SET ASIDE—INDIRECT ATTACK.**—A judgment at law in a prior action between the same parties is not *res adjudicata* on the issues in a subsequent suit in equity to set aside such judgment. While this is not a direct attack upon the judgment, neither is it collateral, but is properly designated as an indirect attack.

APPEAL from a judgment of the Superior Court of Alameda County. Stanley A. Smith, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

H. S. Derby and J. C. Nichols for Appellants.

Jay Monroe Latimer and J. E. Pemberton for Respondent.

HAVEN, J.—The appeal is from a judgment in favor of the plaintiff in a suit to rescind a contract for the exchange of real property upon the ground of fraud, and to set aside a prior judgment of the superior court in Alameda County in a suit which grew out of one phase of the dealings between the parties under the contract. The appeal is taken in the so-called “alternative” method. The typewritten transcript of testimony covers something over four hundred pages and the findings of fact alone cover twelve typewritten pages.

[1] As an appendix to appellants’ brief there is printed what is designated a *résumé* of the evidence of three witnesses,

with some references to transcript pages. In the brief itself are certain conclusions of fact, to support which no reference is made either to the transcript or the appendix. There is nothing printed in either brief to inform the court clearly what the issues were before the lower court, and but a single one of the findings is printed, and that in the appendix to respondent's brief. Under these circumstances, the court will not examine the voluminous typewritten transcript in search of error upon which to base a reversal. (*Scott v. Hollywood Park Co.*, 176 Cal. 680, [169 Pac. 379]; *Randall v. Allen*, 26 Cal. App. Dec. 852.)

While the above authorities, and many other pronouncements by the appellate courts of this state, justify a refusal to examine any portion of the record not printed in the briefs, we are loath to refuse to pass upon the merits in any case where counsel have endeavored properly to present their points. In this case the appellant contends the judgment should be reversed because of laches on the part of the plaintiff, because of her waiver and ratification of the fraud perpetrated upon her, and because of her failure promptly to meet every requirement of the law in regard to rescission. Giving to the appellants' statement of evidence its strongest force, it appears from the similar unsatisfactory statement of evidence in the respondent's brief that there was a clear conflict of evidence as to the time when plaintiff had knowledge of the fraud, and as to the extent of such knowledge, upon which facts the defenses of laches, waiver, and ratification are all dependent. It must be assumed, therefore, the findings were supported by sufficient evidence. [2] This court cannot overturn the findings of the court below where there is a substantial conflict of evidence upon the facts found. (*Tracy v. Smith*, 175 Cal. 161, [165 Pac. 535].)

The same conditions of conflict exist and the same rule applies to the appellants' contention that the plaintiff failed to show the defendants knew of the fraud perpetrated by their agent. Upon this latter point the appellants claim that a new trial should have been granted on the ground of surprise, because of certain proceedings connected with the non-appearance of one Fitch, whose evidence was desired by the defendant company. At the opening of the trial counsel for the parties entered into a stipulation in open court, made a part of the record in the case by the direction of the judge

who was presiding, to the effect that the trial should proceed at that time and, after all available evidence had been introduced, the evidence of the witness Fitch might be introduced. At the close of the trial the appellants sought a continuance of the case in order that the evidence of Fitch might be taken upon his arrival from abroad, a statement being made that he was expected to reach the place of trial within about ten days. The attention of the court was called to the stipulation, notwithstanding which continuance was refused. It is claimed by the appellants that a formal showing would have been made for the continuance but for the stipulation, and that its disregard and the refusal to adjourn the trial deprived the appellants of substantial evidence. So much of the record as is presented by the briefs fails to support this contention. The evidence which the appellants claim would have been given by the witness Fitch was that the defendant company had no knowledge of the admitted fraud perpetrated upon the plaintiff by the company's agent. Apart from any question of the imputed knowledge of the principal, it appears that another agent and officer of the defendant corporation testified that he knew of the fraudulent acts of which complaint was made; that he knew that the agent of the corporation was also the agent of the plaintiff and was receiving compensation both from the plaintiff and from the defendant corporation. Under these circumstances, the evidence of Mr. Fitch could have had no greater force than to import a further conflict of evidence in the case upon an immaterial matter. If there was error in this particular, the appellant has failed to show injury therefrom. [3] We cannot say, therefore, that the refusal of the trial court to grant the continuance or to grant defendants' motion for a new trial was reversible error.

Appellants further claim that the plaintiff failed to establish collusion or fraud in the transaction complained of. The court found the existence of such fraud; and the record discloses sufficient evidence to support such finding.

Objection is made to plaintiff's offer to rescind the fraudulent contract on the ground that the deed of reconveyance from plaintiff to the defendant company of the Yolo County land, which had been conveyed to plaintiff under the contract, did not accompany the offer, and was not tendered to the corporation at its office in San Francisco. The deed re-

ferred to was deposited in a bank at Woodland and the defendant company was notified to call for it. [4] Under the circumstances, this was a sufficient notice of rescission and offer to restore the consideration. The notice was received by the defendant company and it was advised where the deed to it could be obtained upon compliance by it with the plaintiff's demand for a reconveyance to her of the land she had deeded to the company under the contract.

The further contention of appellants that the judgment in a prior action between the same parties is *res adjudicata* and conclusive upon the issues here involved is answered by consideration of the fact that the present action is a suit in equity to set aside the very judgment relied upon. [5] While this is not a direct attack upon the judgment, neither is it collateral, but is properly designated as an indirect attack. In such a case the judgment is not conclusive. In *Eichhoff v. Eichhoff*, 107 Cal. 42, 48, [48 Am. St. Rep. 110, 40 Pac. 24, 25], the supreme court says: "In fact, when an action is brought in a court of equity to set aside a judgment at law the attack, although not collateral, is always indirect. (Freeman on Judgments, sec. 485.) The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not procured by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it."

The case of *Bingham v. Kearney*, 136 Cal. 175, [68 Pac. 597], relied upon by appellants, is distinguished from the instant case, for the reason that that suit was brought to set aside the contract, the validity of which had been determined in the prior action, and was not an attack on the judgment itself.

We find no prejudicial error in the record. The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2654. First Appellate District, Division One.—March 14, 1919.]

JENNIE G. KNOX, Executrix, etc., Appellant, v. **WILLIAM B. KEARNEY et al.**, Respondents.

- [1] **DEEDS — DELIVERY — RECORDING — CHANGE OF POSSESSION — PASSING OF TITLE.**—As between the grantor and the grantee, neither the recording of the deed nor the delivery thereof accompanied by a change of possession is essential to a valid conveyance.
- [2] **ID.—ACCEPTANCE IMPLIED.**—Where a deed is delivered to the grantee in person, an acceptance will be implied, in the absence of evidence to the contrary.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Affirmed.

The facts are stated in the opinion of the court.

T. J. Crowley and Emilio Lastreto for Appellant.

Gerald C. Halsey and Harris & Hess for Respondents.

KERRIGAN, J.—This is an action, brought by the plaintiff as guardian of the person and estate of Jane McQueen, an incompetent person, and continued by said plaintiff upon her decease as executor of her estate, wherein the relief sought was the cancellation of two deeds, alleged to constitute a cloud upon plaintiff's title. Judgment was rendered for defendants. Plaintiff appeals, and brings to this court a record consisting of the judgment-roll alone.

The essential facts of the case as shown by the findings are as follows: Jane McQueen, about eight years before her death, being at that time of sound mind, and the owner of the property described in the complaint, executed two deeds thereto, and with the intent to make an absolute gift of the real property therein described to her son, Alfred W. McQueen, delivered them to him. It being the desire of the grantor that the deeds should not be recorded during her lifetime, they were immediately after their delivery as aforesaid placed in the possession of the defendant William B. Kearney, with instructions to that effect. Six years after making these deeds

Jane McQueen was declared incompetent, and two years later she died, and the plaintiff, who had been the guardian of her person and estate, was appointed executor thereof. Alfred W. McQueen had predeceased her, having died intestate on August 23, 1914, and his widow, the defendant Pauline M. McQueen, was appointed administratrix of his estate. The complaint alleges a demand upon the defendant Kearney for the return of the deeds, and his refusal to accede thereto, but the findings declare that no such demand was made.

In support of the appeal the plaintiff contends that the findings fail to show that there was an acceptance of the conveyance by Alfred W. McQueen; and also that the findings fail to support the judgment, for the reason that they do not disclose that the delivery of the deeds was accompanied by a transfer of possession of the property. He also argues in support of the appeal that this court should hold that a deed long unrecorded is invalid, challenging the soundness of the decisions to the contrary, and urges that the rule of those decisions places a premium upon fraud.

In the case at bar the court found that there was a complete delivery of the deeds by the grantor to the grantee without any condition or reservation. The title thereupon, it is clear, passed to the grantee, and this irrespective of whether the deeds were recorded, or the delivery thereof was accompanied by a change of possession. [1] As between the parties the performance of neither of these things is essential to a valid conveyance; nor is there any violation of law nor infringement of public policy by the grantee failing to place his deed on record, or by the grantor retaining possession of the property (*Fisher v. Ludwig*, 6 Cal. App. 144, [91 Pac. 658]).

[2] As to the point that the findings fail to show that there was an acceptance of the conveyance, we think that since the findings show that the deeds were delivered to the grantee in person, an acceptance is implied. We see no reason why such a case is not covered by subdivision 28 of section 1963 of the Code of Civil Procedure, declaring it to be a disputable presumption, controvertible by evidence, that things have happened according to the ordinary habits of life. If we understand human nature as illustrated by the ordinary habits of life, we would not hesitate to affirm that a person to whom is conveyed valuable real property and who takes delivery of the deed conveying it, usually accepts the

conveyance. True, it is a disputable presumption, but one requiring evidence to controvert; and in the absence of such evidence the finding of the court of a delivery is sufficient. There might, of course, be a mere manual delivery of a deed effected by some artifice, from which an acceptance could not be implied, but here the findings present no such case. (14 Cyc. 570; *Rousseau v. Bleau*, 60 Hun, 259, [14 N. Y. Supp. 712, 716]. See, also, *De Levillain v. Evans*, 39 Cal. 120; *Bensley v. Atwill*, 12 Cal. 236; *Kenniff v. Caulfield*, 140 Cal. 34, [73 Pac. 803].)

The judgment is affirmed.

Waste, P. J., and Richards, T., concurred.

[Civ. No. 2790. Second Appellate District, Division One.—March 14, 1919.]

GUARANTY TRUST & SAVINGS BANK (a Corporation),
Respondent, v. ALBERT L. MARSH et al., Defendants;
E. RABIN, Appellant.

[1] LANDLORD AND TENANT—SERVICE OF NOTICE ON ASSIGNEES—RECOGNITION OF TENANCY.—The fact that a lessor serves on the assignees of the lessee the statutory three days' notice to pay the rent then due or surrender possession of the premises shows that such lessor recognizes the tenancy of such assignees.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

Henry M. Willis for Appellant.

Call & Call and Anderson & Anderson for Respondent.

CONREY, P. J.—Action in unlawful detainer. A trial was had of the issues between plaintiff and appellant, the other defendants having suffered default. At the time of the trial appellant surrendered the leased premises to the plaintiff. Judgment was entered against appellant for the rent for the

time covered by his occupancy, from which judgment defendant Rabin has appealed.

Appellant contends that the judgment against him should be reversed for the reason that there was no finding that the relation of landlord and tenant existed between the plaintiff and appellant, and that there was no evidence in the record to support the finding that appellant entered the premises on May 20, 1918, under an assignment of the lease theretofore executed by the plaintiff to Marsh and Bracken. The complaint alleged and it is admitted that the record proves that on the twenty-eighth day of January, 1918, the plaintiff executed to Albert L. Marsh and Bertram Bracken a three-year lease of the premises described in the complaint. The lessees went into possession on the tenth day of February following the date of the lease. The complaint alleged that appellant and two other defendants "claim some interest in said lease or said premises under the said lessees, and are in possession of the said premises, or a part thereof, under the said lessees." This allegation was not denied. That it probably could not have been successfully denied is indicated by the uncontradicted testimony of the witness Harrington that appellant, at a time while he was in possession of the premises, declared that he held such possession under an assignment of the Marsh and Bracken lease.

There is no merit in appellant's further contention that the relation of landlord and tenant did not exist between him and the plaintiff, the reasons alleged by him being that the plaintiff never consented in writing to an assignment of the lease and never accepted him as a tenant and never received rent from him. Those portions of the lease which have been printed with the briefs do not show any contract that an assignment of the lease must be approved in writing by the lessor. If there had been such stipulation, it must have existed for the benefit of the lessor and not for the protection of the lessee under such circumstances as here appear. [1] That the plaintiff did recognize appellant's tenancy prior to the commencement of this action is shown by the fact that plaintiff served upon appellant, together with other persons, the statutory three days' notice to pay the rent then due or surrender possession.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 12, 1919.

All the Justices concurred.

[Civ. No. 2823. First Appellate District, Division One.—March 15, 1919.]

JAMES J. FLINN et al., Respondents, v. CHARLES ZERBE et al., Appellants.

- [1] **STREET LAW—IMPROVEMENTS UNDER PUBLIC CONTRACT—PERSONAL LIABILITY OF PROPERTY OWNER.**—No personal liability can be constitutionally imposed upon a property owner for street improvement under a public contract, but the cost thereof may be imposed as a lien or charge upon the specific property benefited.
- [2] **ID.—SAN FRANCISCO CHARTER AND ORDINANCE—LIEN FOR IMPROVEMENTS.**—Under section 33, article VI, chapter II, of the charter of the city and county of San Francisco, the board of supervisors had authority to enact, as they did in Ordinance No. 2439 (New Series), that the contractor performing street work thereunder should have a lien upon the property benefited by the improvement for the cost thereof.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. M. Anthony for Appellants.

Fabius T. Finch and Paul F. Fratessa for Respondents.

RICHARDS, J.—Plaintiffs brought this action to foreclose the lien of a street assessment upon certain lands of the defendants. It appeared upon the face of the complaint that the proceedings for the improvement of the street and the assessment of the lands of the defendants therefor were taken under the provisions of Ordinance No. 2439, N. S., of the city and county of San Francisco. The defendants demurred to

the complaint. Their demurrer being overruled, they elected to stand upon it, and, accordingly, declined to answer, whereupon judgment was entered against them as prayed, decreeing a sale of the premises in satisfaction of the lien of the assessment.

In support of their appeal the defendants make but one contention, namely, that the board of supervisors of the city and county of San Francisco had no authority to enact, as they did, in Ordinance No. 2439, N. S., that the contractor performing street work thereunder should have a lien upon the property benefited by the improvement for the cost thereof.

This contention is based upon the appellants' construction of section 33, article VI, chapter II, of the municipal charter, which, so far as the question is concerned, provides as follows:

"The methods of procedure in this article provided for the improvement of streets . . . and for the assessment of the expense thereof . . . upon private property shall not be deemed exclusive, but the board of supervisors . . . may by ordinance substitute therefor any method of procedure in any general law of the state of California . . . providing for any such improvements in municipalities, and levying assessments for the expense or portion thereof upon private property; or the board may . . . adopt an ordinance . . . providing a method of procedure for such improvement and assessment . . ."

The ordinance under which the present work was done was adopted under the authority of the last part of this provision of the charter, and the point of the appellants' contention is that this authority to enact a method of procedure for the improvement of streets and of assessment for the cost thereof does not give to the municipal governing body the power to provide that the assessment shall be a lien upon the property assessed.

We think this contention unsound, both upon reason and authority. [1] It has been uniformly held in this state that no personal liability can be constitutionally imposed upon a property owner for street improvement under a public contract, but that the cost thereof may be imposed as a lien or charge upon the specific property benefited (*Taylor v. Palmer*, 31 Cal. 249; *Williams v. Rowell*, 145 Cal. 261, [78 Pac. 725]; *Atchison etc. Ry. Co. v. Reclamation District*, 173 Cal. 93, [159

Pac. 430]), and the power given to the board of supervisors to enact a method of assessment evidently contemplates an assessment of property rather than of the property owner. It will be noticed that by the section of the charter quoted the alternative is given to the board of supervisors either to adopt by ordinance any existing method of street improvement and assessment provided by the general law, or the method already provided in the charter of the city and county, or to enact a new one. Under the methods provided by the general law of the state and by the charter, an assessment for street improvement is made a lien upon the specific property benefited, and it is apparent that if the board of supervisors by ordinance had adopted any of those methods, such method would have been in force in the municipality not by virtue of its being a state law, but because of its enactment by ordinance. From which it follows that there is no legislative intent to be discerned in section 33, article VI, chapter II, of the charter, to exclude from the grant of power to the board of supervisors the ability to provide for a lien upon property in street improvement matters. The particular language employed in this section also leads to the same conclusion. It refers to the assessment provided for in general laws of the state and by the existing municipal charter (all of which are assessments upon property enforceable by sale thereof), and then says that the board of supervisors may by ordinance provide for "such" assessment, i. e., the kind of assessment just mentioned in the section.

The appellants' principal argument in support of their contention is based upon the definition of the word "assessment." They cite Cooley on Taxation (page 258) to the effect that "an assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists of two processes, listing persons properly to be taxed, and of estimating the sums which are to be the guide of an apportionment of the tax between them." With this and similar definitions as a basis, they readily demonstrate by the citation of authority that the power to assess does not include the power to impose a lien. But here the assessment is not imposed upon the person, but upon the property, which necessarily includes a power to col-

lect the assessment by a sale of the property, and whether we speak of the method of enforcing the assessment as the foreclosure of a lien upon the property, or a sale of the property for the collection of the amount assessed, is immaterial, they evidently being the same thing.

[2] Turning to authority, we find that the power conferred by this section of the charter to enact a method of assessment has been construed by our supreme court as meaning an assessment carrying a lien upon the property assessed. In *Mardis v. McCarthy*, 162 Cal. 94, 101, [121 Pac. 389], an ordinance in all respects similar to the ordinance which we are here considering (that is, as to the imposing of liens), was under consideration, except that it provided for the boring of tunnels, instead of grading, paving, sewerage, curbing, and sidewalk streets. The tunnel ordinance provided for the imposing of the burden of the cost of the work upon private property (that is, imposing a lien), and was authorized by the same section 33, chapter II, article VI, of the charter, as authorized the street improvement ordinance which we are now considering. In that case the delegation of the authority to the board of supervisors to adopt such ordinance was upheld, and the method of procedure provided in the ordinance for the assessment and collection of the cost of the improvement from the adjoining lands by lien was held to be within the scope of the charter authority.

In the case of *Hayne v. City and County of San Francisco*, 174 Cal. 185, [162 Pac. 625], the supreme court was considering the same ordinance as in the case just cited, passed, as we have seen, under the same authority as the one here construed. The objection that is now made was there advanced to that ordinance and was held not to be a valid objection.

We conclude, therefore, that the court did not err in overruling the defendants' demurrer to the complaint. The judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2832. First Appellate District, Division One.—March 17, 1919.]

FRANK H. OGRAM, Appellant, v. C. WELCHOFF et al.,
Respondents.

- [1] **MECHANICS' LIENS — ENUMERATION OF CLASSES OF PERSONS — PURPOSE.**—The enumeration of various classes of persons in section 1183 of the Code of Civil Procedure is in no sense a classification of them for the purpose of providing a lien for each class, but is simply an attempted enumeration of those callings whose members furnish the requisite labor in the construction of buildings, and the lien is the same in the case of all persons entitled, and is given to them not as followers of a particular trade or calling, but as persons having furnished labor contributing to the erection of the building.
- [2] **ID.—CONSTRUCTION OF CODE SECTIONS.**—The sections of the code embracing the mechanic's lien law, being remedial in character, should be liberally construed.
- [3] **ID.—NO WORK "AGREED TO BE DONE" — STATEMENT OF CLAIM.**—Where an artisan, such as a carpenter, is employed at daily wages to work at his trade under the direction of his employer and no specific work is agreed to be done, the requirement of section 1187 of the Code of Civil Procedure that the "work agreed to be done" should be stated in the claim of lien, has no application.

APPEAL from a judgment of the Superior Court of Alameda County. J. J. Trabucco, Judge Presiding. Reversed.

The facts are stated in the opinion of the court.

Keyes & Horne and W. L. Newby for Appellant.

Carl F. Wood for Respondents.

RICHARDS, J.—This was an action to foreclose a mechanic's lien. Judgment went for defendants upon the ground that the lien filed by the plaintiff was void because it did not contain "a statement of the work agreed to be done by plaintiff." Plaintiff appeals, the record on appeal consisting of the judgment-roll alone.

The sole question presented is whether or not the claim of lien substantially complied with the section of the Code of Civil Procedure prescribing what it should contain.

Section 1183 of the Code of Civil Procedure provides that certain classes of persons therein enumerated shall have a lien upon the property upon which they have bestowed labor, or in the construction of which they have furnished materials, and it is not disputed that the plaintiff comes within one of such enumerated classes.

Section 1187 of said code provides that every person claiming such lien must file a "claim of lien containing a statement of his demand . . . with the name of the owner or reputed owner, if known, also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the price, if any, agreed upon for the same and when payable, and of the *work agreed to be done* . . .," etc.

The claim of lien filed by the plaintiff, so far as it bears upon the question to be considered, states: "Notice is hereby given that Frank Ogram . . . as laborer, claims a mechanic's lien upon the premises hereinafter described for labor performed by him. . . . That Fletcher & Newby and P. A. Newby are the names of the contractors who . . . entered into a contract with said Frank H. Ogram, claimant herein, under and by which said labor was performed, and the following is a statement of the terms, time given and conditions of said contract, to-wit: he was to be paid for his services at the rate of \$3.50 per day. . . . That said contract has been fully performed on the part of said Frank H. Ogram, claimant . . . and the total amount of the claim of said Frank H. Ogram for labor by him furnished as aforesaid is \$101.50. . . ."

It appears from the complaint, and the court so found, that the plaintiff's employment upon the building in connection with which the lien was filed was as a carpenter, and that his labor upon said building was that of a carpenter. As already pointed out, the court also found that the plaintiff did not include in his claim a statement of the "*work agreed to be done*," and for this reason held the claim of lien to be invalid. The learned judge of the trial court evidently construed the statute as requiring this even in the case of an artisan, such as a carpenter, who is employed at a daily wage for the purpose of plying his trade as directed from day to day and from hour to hour. It is apparent, we think, that a claimant of this class, employed at daily wages to work at his trade under the direction of his employer, cannot include

in the statement of his claim "the work agreed to be done," if in fact no such agreement has been made. At most he could state the general character of the work he expected to be called upon to do, and in support of the judgment the respondents argue that this the plaintiff should have done.

In construing this requirement of the section it must be borne in mind that the section is prescribing the contents of the claim of lien of quite different classes of persons, and it is not likely—indeed, quite the contrary—that the requirements laid down for the lien of a contractor or subcontractor would be literally applicable to the claim of lien to be filed by a mechanic or laborer. In the case of a contractor he evidently is able to state the "work agreed to be done," for his contract of necessity specifies it, and we are of the opinion that a correct construction of this requirement would confine it to such cases.

And it would not follow that because a person was not able to state the "work agreed to be done" for the very good reason that no specific work had been agreed upon, he must in lieu thereof state the general character of the work that he was employed to do.

We may notice in passing a secondary contention of respondents, that the mechanic's lien law establishes different classes of claimants, and that a person must claim his lien within his class, e. g., the plaintiff having furnished labor as a carpenter should have claimed his lien as a carpenter.

[1] We think it sufficient to say in answer to this contention that the enumeration of various classes of persons in section 1183 of the Code of Civil Procedure is in no sense a classification of them for the purpose of providing a lien for each class. It is simply an attempted enumeration of those callings whose members furnish the requisite labor in the construction of buildings, and the lien is the same in the case of all persons entitled, and is given to them not as followers of a particular trade or calling, but as persons having furnished labor contributing to the erection of the building. If we followed this contention of the respondents to its logical conclusion, the plaintiff being a carpenter would have no lien at all, for we do not find the trade of carpenter included by name in the enumeration.

[2] The sections of the code embracing the mechanic's lien law being remedial in character should be liberally construed.

(Code Civ. Proc., sec. 4; *Union Lumber Co. v. Simon*, 150 Cal. 751, [89 Pac. 1077, 1081].) Some of the earlier constructions of these sections, although purporting to follow the rule of construction laid down in section 4 of the Code of Civil Procedure, were still somewhat technical, and the legislature showed its disapproval of the method followed by adding to the law on the subject section 1203, which directs that certain kinds of mistakes in claims of lien which theretofore had been held sufficient to invalidate them should not be given that effect; thus emphasizing the legislative intent that the greatest liberality consistent with the attainment of the object of the sections should be exercised in their construction. We are not, therefore, called upon to hold that because a claimant, from the nature of his employment, is unable to specify the "work agreed to be done," he must in lieu thereof state the general character of the work he was employed to do. It seems to be conceded that the object of requiring certain details to be set forth in the lien is to enable the owner of the property against which the lien is filed to investigate the correctness of the demand. In the present case the owner of the property, being apprised by the claim of lien that the claimant had performed labor for a certain number of days at a specified daily rate of compensation under the employment of certain named persons, he was just as well able to investigate the correctness of the claim as if he had been further informed that the particular work done was that of a carpenter.

[3] Our conclusion is that as the record discloses that there was no specific work agreed to be done by the plaintiff, the requirement of section 1187 of the Code of Civil Procedure, that it should be stated in the lien has no application to this case, and the findings of the court being in plaintiff's favor on the remaining issues, the court erred in holding that the plaintiff's claim of lien was null and void. The judgment is therefore reversed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2866. Second Appellate District, Division Two.—March 17, 1919.]

H. & W. PIERCE, INCORPORATED (a Corporation),
Appellant, v. COUNTY OF SANTA BARBARA (a Body
Politie and Corporate), Respondent.

- [1] **TAXATION—EQUALIZATION OF ASSESSMENTS—HEARING BY BOARD—EVIDENCE—RECORD.**—In the equalization of the assessment of property for the purpose of taxation, there is no provision for taking down of evidence introduced before the county board of equalization at the hearing, or providing for a bill of exceptions to the rulings of such board; hence any question as to the sufficiency of the evidence to authorize the action of the board must be determined by an inspection of the record itself, in the absence of fraud or malicious abuse of power.
- [2] **ID.—SUFFICIENCY OF EVIDENCE—RECITAL CONCLUSIVE.**—Where evidence was taken at the hearing before the board of equalization in support of a raise in the assessed valuation of the property, the recital of that fact in the order forecloses discussion as to the sufficiency of the evidence.
- [3] **ID.—REVERSAL OF VALUATION—EQUITY.**—Equity will not inquire into irregularities, nor reverse questions of valuation, unless the valuation is so grossly excessive as to be inconsistent with an exercise of honest judgment, or is so unequal and discriminating as to violate the fundamental law of the land.
- [4] **ID.—VOID ASSESSMENT—MORAL OBLIGATION.**—In actions to recover taxes, as well as in actions to enjoin or set aside tax deeds, the law is that when there is a moral obligation to pay the tax, it cannot be revoked on account of some technical defect rendering the assessment void.
- [5] **ID.—VALUE OF LAND—ELEMENTS.**—In arriving at the value of land used as a stock ranch, the board is not restricted to the value thereof when used for that particular purpose, but should take into consideration all its capabilities or the uses to which it is adapted.
- [6] **ID.—JUDGMENT OF BOARD CONCLUSIVE.**—Where evidence is in fact taken by the board of equalization, its decision thereon raising an assessment is, in the absence of fraud, valid and conclusive, and its judgment not subject to the supervision of the courts.
- [7] **ID.—ASSESSMENT-ROLL—OMISSION OF DOLLAR-MARKS AND PUNCTUATION—EFFECT.**—A taxpayer cannot recover taxes paid under protest because of the omission on the assessment-roll of the dollar-mark before the figures and the punctuation marks in the proper places,

where it was not misled thereby but went into court and asked for the exact amount which it claims was paid in excess of that which it contends should have been paid.

'APPEAL from a judgment of the Superior Court of Santa Barbara County. S. E. Crow, Judge. Affirmed.

The facts are stated in the opinion of the court.

Pillsbury, Madison & Sutro, R. B. Canfield and Canfield & Starbuck for Appellant.

U. S. Webb, Attorney-General, T. R. Finley, Geo. H. Gould and E. W. Squier for Respondent.

THOMAS, J.—This action is brought by plaintiff to recover taxes paid under protest as provided by section 3819 of the Political Code.

It is contended by plaintiff, the appellant here, and admitted by respondent in its brief (although this contention was denied in the trial court) that this action being brought under said section, plaintiff was required to present no claim or demand for taxes so paid to the board of supervisors, and that the ruling of the trial court in sustaining plaintiff's demurrer to this affirmative defense, numbered "Third" in the answer, was proper. In view, therefore, of this condition of the record, appellant's first point may be deemed disposed of. As to this disposition, however, of that point, as between the parties themselves, we express no opinion favorable or adverse thereto.

It is urged by appellant that "a board of equalization cannot change an assessor's valuation of property for purposes of taxation without evidence authorizing them to do so." This is conceded by respondent; but in that concession respondent insists that "after hearing evidence bearing upon the matter, said board has such jurisdiction."

Nothing in the complaint here appears from which fraud or abuse of discretion may be imputed to either the assessor or the board of equalization.

It is contended by appellant that "there was no evidence before the board in this case authorizing the increase ordered," and that "there was not sufficient evidence before the board here to authorize the increase ordered." In this we are unable

to agree with appellant. There is no merit in this contention. The record discloses that the minutes of the board of supervisors bearing on this matter show on their face that on July 25, 1912, when the matter of raising the assessment came on to be heard, "the following witnesses were sworn and examined: I. W. Stewart, Thos. Nuckolls, John Roupp, and Clio L. Lloyd, County Assessor." Indeed, from the conclusive character of the board's order it is clear that evidence was introduced before the board which, if believed by them—as it obviously was—was sufficient to justify the making of and to support the order. (*Farmers & Merchants' Bank v. Board of Equalization*, 97 Cal. 318, [32 Pac. 312].)

[1] We know of no provision, and none has been called to our attention, for taking down the evidence at a hearing, such as the one under discussion here, before a board of equalization, or providing for a bill of exceptions to the rulings of such board. Hence, it must be held that the questions here presented must be determined by an inspection of the record itself, in the absence of fraud or malicious abuse of power (*Farmers & Merchants' Bank v. Board of Equalization*, *supra*); and in such case "the board of equalization is the sole judge of the questions of fact and of the value of property." (*La Grange etc. Min. Co. v. Carter*, 142 Cal. 560-565, [76 Pac. 241, 243].) [2] We are clear that the record discloses beyond controversy that evidence was taken at the said hearing before the board of equalization in support of the raise, and the fact, recited in the order, that evidence was taken, forecloses discussion as to the sufficiency of the evidence. (*Teague v. Board of Trustees*, 156 Cal. 351, [104 Pac. 581]; *People v. Town of Ontario*, 148 Cal. 625, [84 Pac. 205]; *People v. Loyalton*, 147 Cal. 774, [82 Pac. 620]; *Central Pacific R. R. Co. v. Board of Equalization of Placer County*, 46 Cal. 667; *Pittsburg etc. Co. v. Backus*, 154 U. S. 421, [38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114, see, also, Rose's U. S. Notes].)

Complaint is made that "the court erred in refusing to hear proof of the further evidence produced before the board after the evidence of the rental value of the land had been shown to have been given." Appellant then argues that "the court can never tell in advance what may be the effect of further evidence, and should try a case through to the end without stopping the trial on the ground that it has heard enough. Such a course of procedure condemns the litigant before he

has been fully heard. All relevant evidence should be received, unless unreasonably cumulative." Obviously, this is a self-evident truth. Before we can condemn the trial judge in the case at bar, however, of such conduct, and without questioning in the remotest degree the honesty or integrity of counsel for appellant, may we be pardoned if we suggest that he has cited us to no evidence in the record here supporting such criticism; and, indeed, we know of no law, and none has been cited to us, that authorizes us to do so on the argument of counsel in his brief on appeal. If the introduction of testimony before the board be jurisdictional, then the order of the board is conclusive as to the jurisdictional facts, unless the contrary appears by the record (*Humboldt County v. Dinsmore*, 75 Cal. 604, [17 Pac. 710]); and this is the rule which prevails both in cases of *certiorari* and appeal. (*Hagemeyer v. Board of Equalization of Mendocino County*, 82 Cal. 214, [23 Pac. 14].)

The last ground for reversal urged by appellant is that "the correctness of the board's order, independent of the evidence upon which it was based, is immaterial." We are of the opinion that this difficulty is more apparent than real. It is urged that until the board, acting within its powers, has changed an assessor's valuation, that valuation is presumptively the correct valuation, and is final, and the real owner is entitled to "rest securely upon" it as a settled valuation—and in support of this contention cite *People v. Reynolds*, 28 Cal. 108. As we view the case at bar, that case is not in point.

[3] It must be remembered that "equity will not inquire into irregularities, nor reverse questions of valuation, unless the valuation is so grossly excessive as to be inconsistent with an exercise of honest judgment, or is so unequal and discriminating as to violate the fundamental law of the land." (27 Am. & Eng. Ency. of Law, 724; 37 Cyc. 1111 et seq.) In the case at bar, as we have already seen, there was no claim made by appellant in his complaint, nor is there any evidence in the case, that either the assessor or the board of supervisors, sitting as a board of equalization, were guilty of fraud or abuse of discretion. A careful reading of the record in this case—and assuming, without so holding, that we can in this proceeding review the evidence taken before the board—discloses, we think, without contradiction, that the value of

the ranch referred to in this proceeding was at least that assessed by the board, and that the tax was no greater than that imposed upon property of similar character located in that vicinity.

[4] In actions, such as the present one, to recover taxes, as well as in actions to enjoin or set aside tax deeds, the law is that when there is a moral obligation to pay the tax, it cannot be revoked on account of some technical defect rendering the assessment void. (*Steele v. San Luis Obispo County*, 152 Cal. 785, [93 Pac. 1020]; *Couts v. Cornell*, 147 Cal. 560, [109 Am. St. Rep. 168, 82 Pac. 194]; *Esterbrook v. O'Brien*, 98 Cal. 671, [33 Pac. 765].)

The testimony of the witnesses, together with other evidence introduced before the board, shows clearly that at that hearing it was contended, in behalf of appellant, that the value of the property should be determined by the rental it was producing as a "stock proposition." The board refused to be so restricted. They recognized this fact as an element which might assist in arriving at its real value in money, but took into consideration, in fixing the valuation, the value of the ranch for any purposes to which it appeared to be adapted. We do not think it necessary to cite authorities to support the view of the board, the correctness of which is so obvious. But if it was erroneous, it was an error committed in the exercise of the jurisdiction of the board to hear and determine the matter before it, and such error does not render the order void. [5] In arriving at the value of the land, *all* its capabilities, or the uses to which it is adapted, should be taken into consideration. (*Muller v. Southern Pac. B. Ry. Co.*, 83 Cal. 240, [23 Pac. 265]; *Santa Ana v. Harlin*, 99 Cal. 538, [34 Pac. 224]; *San Diego Land Co. v. Neale*, 78 Cal. 63, [3 L. R. A. 83, 20 Pac. 372].)

The powers and duties of county boards of equalization are prescribed by section 3672 et seq. of the Political Code. No appeal from its decisions, or other method of having its decisions reviewed by a court of law, is provided by statute. [6] While it appears in the case at bar that evidence was in fact taken by the board, the decision of the board thereon raising the assessment is, in the absence of fraud, valid and conclusive, and its judgments are not subject to the supervision of the courts. (37 Cyc. 1111; 27 Am. & Eng. Ency. of Law, 720; *Keokuk etc. Bridge Co. v. People*, 185 Ill. 276,

[56 N. E. 1049]; *Board of Commrs. v. Bullard*, 77 Kan. 349, [16 L. R. A. (N. S.) 807, 94 Pac. 129]; *Doty Lumber etc. Co. v. Lewis County*, 60 Wash. 428, [Ann. Cas. 1912B, 870, 111 Pac. 562]; *Stanley v. Supervisors*, 121 U. S. 535, [30 L. Ed. 1000, 7 Sup. Ct. Rep. 1234, see, also, Rose's U. S. Notes].)

The record discloses that the property in question was assessed to plaintiff for purposes of taxation by said county and state, and on the assessment of said county "each of said parcels of real property" was so assessed, and that the aggregate amount assessed against such parcels of real property by the county assessor, as aforesaid, is the sum of \$88,210. That thereafter, on July 18, 1912, the board of equalization did serve a notice upon plaintiff requiring it to show cause, if any it had, why said assessment should not be raised from said sum last stated, to the sum of \$175,000; that said notice complied with the rule of said board in such matters made and provided, and which said rule was promulgated and adopted in compliance with section 3673 of the Political Code; that evidence was taken, and after consideration of the same, and upon reconvening after an adjournment from morning until the afternoon session on the same day, the following record appears: "On motion, duly seconded, it is ordered that said assessment be, and the same is hereby raised from \$88,210 to \$175,000"—all the supervisors voting in the affirmative. As already intimated, no fraud being alleged or proven, this is conclusive. (*Los Angeles Gas etc. Co. v. County of Los Angeles*, 162 Cal. 164, [121 Pac. 384].)

Appellant contends, in effect, that the statute requires the board to designate *in figures* the exact amount of increase for each parcel. This is not the case. From what has just been said, manifestly all was done that the law requires, nothing being left but simply a calculation—a simple problem in arithmetic. The board may designate the percentage or proportion to be figured out by the ministerial officer. The maxim, "That is certain which can be made certain," is applicable here. (Civ. Code, sec. 3538.)

[7] By the specific terms of section 3819, *supra*, it is provided that "if it shall be adjudged that the assessment, or the part thereof referred to in the protest, *was void on the ground specified in the protest* [the italics are ours], judgment shall be entered," etc. The grounds specified in the protest were, first: "Nowhere on the face of said assessment-

roll is there any dollar-mark, or other mark, sign, word, abbreviation, or explanation to indicate what is meant by the figures in the columns on said assessment-roll, which are designed to show the value of the property or the amount of the taxes levied against said property." The answer to this objection is that, while the presence of the dollar-mark before the figures, and the insertion of punctuation marks in the proper places, would probably have been the proper practice, still appellant evidently has not been misled by that omission, as is evidenced by the fact that it went to court and asked for the exact amount which it claims was paid in excess to that which it contends should have been paid. The second ground specified in the protest is "that the board did not hear evidence upon which the order raising the assessment could be based." Third: "That the board raised said assessment because it considered that 'it was necessary to derive more revenue for county purposes, and preferred to raise the amount of the assessment of the said property rather than to raise the tax rate.'" Fourth: "Because the further purpose of the board was to compel appellant to subdivide said property," etc.; and Fifth: "Because it did not increase 'the assessment of each parcel of land separately,' but determined and ordered that the assessment of all the property mentioned in said schedule should be raised to the sum of \$175,000." The court held that appellant had failed to produce evidence in support of these grounds, and found against it on those points. The evidence here fully supports that finding.

After an examination of the entire cause, including the evidence taken before the board of equalization, as disclosed by the record here—which we were under no legal, equitable, or moral obligation to do—we fail to find therein any improper admission or rejection of testimony, or any error as to the matter of procedure which has resulted in the miscarriage of justice, or because of which the appellant herein has been denied any substantial right.

The judgment and order appealed from are, and each of them is, hereby affirmed.

Finlayson, P. J., and Sloane, J., concurred.

[Civ. No. 2616. Second Appellate District, Division One.—March 17, 1919.]

**LAWRENCE JENSEN, Respondent, v. CARROL ALLEN
et al., Appellants.**

- [1] **BOND—APPEAL—CONSTRUCTION OF TERMS—DISCHARGE OF OBLIGATION.**—Where, on appeal from a judgment in favor of the plaintiff in an action to enforce a lien for labor performed and materials furnished in the construction of a yacht which had been purchased by the defendants, the bond is definitely conditioned to remain in force until the appeal shall be determined by the supreme court, and provides that "should the supreme court reverse said judgment . . . then in that event this obligation to be void," the obligation of the bond is fully discharged when the supreme court reverses the judgment.
- [2] **ID.—IMPLIED AGREEMENT—BREACH.**—Where, as in this case, there is an agreement necessarily implied that if the bond is given, the possession of the boat shall remain with the defendants, the plaintiff, by thereafter taking possession of the boat under a writ of attachment, breaches the condition on his part to be performed and the obligation of the bond comes to an end.

APPEAL from a judgment of the Superior Court of Los Angeles County. Sidney N. Reeve, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Wilbur Bassett and Allen & Weyl for Appellants.

Patterson Sprigg for Respondent.

JAMES, J.—Defendants appeal from a judgment entered in the trial court in favor of plaintiff. The action was to recover upon an undertaking or bond alleged to have been given to secure payment of any judgment which plaintiff might obtain in an action brought by him against one Dorr, which action was pending at the time of the execution of the undertaking. In the action referred to plaintiff sought to recover, on his own behalf and as assignee of other claimants, for labor and material furnished in the construction of the yacht "Yankee Girl." The total amount there prayed for was about four thousand dollars. Judgment was asked to enforce the claim as a lien against the yacht. An answer

was filed, but the trial court, responsive to a motion made by the plaintiff in that behalf, held that no material issue was raised by reason of the denials contained in the answer, and entered judgment in favor of the plaintiff on the pleadings. Defendant Dorr appealed to the supreme court. In the meantime Dorr had been declared a bankrupt and a sale had been made of the "Yankee Girl" by the assignee in bankruptcy, the purchasers at the sale being one Sandoval and the International Fisheries Company. While the appeal in the case referred to was pending, the plaintiff brought an action against the purchasers of the yacht and Allen, the assignee in bankruptcy, in which action an injunction was asked for to restrain the defendants from removing the yacht from San Diego County, California, pending the determination of the case of *Jensen v. Dorr*, the demand in the prayer being that such injunction hold "until the *remittitur* in said case shall be returned to this honorable court." After the injunction order was made the bond in suit here was given. The bond recited first the substance of the matters concerned in the injunction suit; recited that upon issues joined by the amended complaint and answer a permanent injunction had been made restraining defendants "from removing or taking from the jurisdiction of said Superior Court, the vessel, 'Yankee Girl,' engine, boiler, tackle, apparel and furniture, now in the harbor of San Diego in said San Diego county, until the *remittitur* in the case of *Lawrence Jensen v. Fred Dorr*, No. 14,311, now pending in the Supreme Court of the state of California, should be returned to said Superior Court, and until the further order of said Superior Court"; and further provided: "Whereas, said International Fisheries Company and A. Sandoval desire the use of said vessel during said period, and did by their counsel move said Superior Court on the 23d day of May, 1910, to release said vessel upon the execution of a good and sufficient bond which they agreed to give, conditioned as hereinafter mentioned; and, whereas, the said Superior Court upon consent of counsel for Lawrence Jensen, granted said motion and fixed said bond at the sum of six thousand (\$6,000.00) dollars; now the condition of this obligation is such that the said International Fisheries Company and A. Sandoval shall well and truly pay or cause to be paid to said Lawrence Jensen, or his assigns, all sums of money found to be a lien upon said vessel, 'Yankee Girl,'

under and by virtue of the final judgment and decree of said Supreme Court in said action of *Jensen v. Dorr*, number 14,311, and all damages and costs which may be awarded in said judgment, not exceeding the sum of six thousand (\$6,000.00) dollars, in favor of said Jensen or his assigns, or will return said vessel in as good condition as it now is within the harbor of said city of San Diego, and within the jurisdiction of said Superior Court, to be there held subject to the orders of said court, within thirty days after notice of the decision and judgment of said Supreme Court in said action of *Jensen v. Dorr*, number 14,311, aforesaid. That should the Supreme Court reverse said judgment and hold that the same constitutes no lien on said vessel 'Yankee Girl,' or that no lien exists by virtue of said judgment, then and in that event this obligation to be void, otherwise to remain in full force, effect and virtue." The judgment in the appeal referred to was by the supreme court reversed as having been improperly made, because, as the supreme court held, the answer as filed by the defendant Dorr therein was sufficient to raise issues and place the plaintiff upon trial of his case. (See *Jensen v. Dorr*, 159 Cal. 742, [116 Pac. 553].) The case was returned to the superior court for trial, was there tried and judgment again entered for the plaintiff, determining that the indebtedness alleged by him existed and that he was entitled to enforce a lien therefor against the yacht. An appeal was taken from this judgment and the judgment was affirmed by this court. (*Jensen v. Dorr*, 23 Cal. App. 701, [139 Pac. 659].) Petition for rehearing in the supreme court was later denied. This action to recover upon the undertaking hereinbefore referred to was then commenced.

Defendants contend that the judgment should be reversed because, first, the obligation of the bond was fully discharged when the supreme court reversed the first judgment in the case reported in 159 California Reports, before cited. Second, assuming that the position just stated is not correctly taken, the defendants became released because the plaintiff, after the decision of the supreme court, took possession of the yacht under writ of attachment. The latter point is presented under the claim of error of the trial court in refusing to admit a stipulation and testimony showing that such attachment was in fact levied. [1] We think that the appellants are right as to both contentions. Referring to the first point made, our

opinion is that the obligation of the bond was definitely conditioned to remain in force only until the appeal pending at the time the bond was executed should be determined by the supreme court and that, as the bond recites, "should the supreme court reverse said judgment and hold that the same constitutes no lien on said vessel 'Yankee Girl,' or that no lien exists by virtue of said judgment, then and in that event this obligation to be void." The obligation was not to answer for the payment of any judgment that might be rendered in the case upon a retrial. We think that this construction is plainly to be drawn from the terms of the undertaking and that it is indicated by the express language used. When the supreme court reversed the judgment on the first appeal there was no obligation left for the bond sureties to respond to. Assuming that they were required, after that judgment was rendered on that appeal, to tender the boat in the harbor of San Diego, the record shows that they offered to prove at the trial that they served written notice upon plaintiff's attorney making such tender, but the trial court refused to allow the testimony to be given. We think that no such notice was required to be given. If such was a prerequisite to the discharge of the obligation, then the court committed error in refusing to allow the proof to be made. If we are correct in thus construing the obligations imposed upon the makers of the bond, the appeal is effectually disposed of, for the second point made assumes that the obligation continued until a final judgment was rendered in the case of *Jensen v. Dorr* on appeal after the trial in the superior court. Defendants offered to prove that, about two months after the decision of the supreme court in *Jensen v. Dorr*, a writ of attachment was issued in that case and levied upon the yacht at the instance of the plaintiff. Counsel for the plaintiff stipulated that such was the fact, but objected to the offer on general grounds, which objection was sustained. Assuming that the bond was in force at the time this attachment was levied, we think that the act of the plaintiff in taking possession of the boat under attachment was an act inconsistent with the terms of the undertaking and of such a nature as to result in the discharge of the obligation of the bond. This bond was given after the permanent injunction had been made and was one which was wholly without the authority of the trial judge to require, and amounted in effect only to a contract made

out of court upon the execution of which the plaintiff in the injunction suit agreed that the defendants might be relieved from the effect of the injunction. There was no appeal in the injunction case; hence the bond was in no wise a bond to stay the execution of the writ. [2] Upon the part of the plaintiff Jensen there was an agreement necessarily implied that if the bond were given, the possession of the boat should remain with the defendants in the injunction suit. By causing the attachment to be levied and by taking possession of the boat under such writ, the plaintiff Jensen breached the condition on his part to be performed and the obligation of the bond became at an end. Assuming, then, that the obligation of the bond was a continuing one and was for the purpose of securing any final judgment that might be rendered in *Jensen v. Dorr*, we think that the trial judge was plainly in error in refusing to allow the defendants to show that plaintiff effectually waived any benefits he might have had under that instrument, by proceeding to have the boat attached.

There are some other points made by the defendants as to alleged errors committed by the trial judge, but as the points discussed appear to be finally determinative of this appeal and of this action, we think it unnecessary to give particular attention to that argument.

The judgment is reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 16, 1919.

[Civ. No. 1953. Third Appellate District.—March 18, 1919.]

GEORGE D. RICHEY, Respondent, v. JAMES A. BUTLER et al., Defendants; M. D. BUTLER, as Administrator, etc., Appellant.

- [1] EVIDENCE—UNCONTRADICTED TESTIMONY—IMPEACHMENT—WEIGHT. A trial court is not legally bound to accept all testimony adduced before it at its face value, or as conclusive, merely because there is no testimony offered and received in contradiction of it. The manner in which a witness may testify often operates as effectually in the impeachment of the verity of his testimony as would affirmative contradiction thereof by other testimony.
- [2] ID.—QUESTIONS OF FACT—TESTS AVAILABLE—APPEAL—REVIEW.—The tests available to trial judges and juries for determining questions of fact are obviously not available to reviewing tribunals, and, therefore, when a trial court or jury reaches a conclusion upon the facts, such conclusion is rarely reviewable, and only so when the questions of fact are of such a character from the nature of the evidence as to resolve them into questions of law.
- [3] ID.—ACTION TO FORECLOSE MORTGAGE—FRAUD AS DEFENSE—REJECTION OF DEFENDANT'S TESTIMONY—DISCRETION.—In this action to foreclose a purchase-money mortgage, the only evidence offered in support of a special defense of fraud in the concealment of the existence of a prior mortgage having been the testimony of the defendant, the situation was not such as to warrant the appellate court in saying that the trial court committed error or an abuse of sound judicial discretion in refusing to accept the defendant's story.

APPEAL from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge. Affirmed.

The facts are stated in the opinion of the court.

Paul F. Fratessa and Edward I. Butler for Appellant.

Thomas B. Leeper for Respondent.

HART, J.—The action was brought to foreclose a mortgage on 80 acres of land in Sacramento County, which was given to secure the payment of a promissory note for one thousand five hundred dollars, executed by James A. Butler and payable to the order of Joseph Roffy, which note and mortgage,

at the commencement of the action, were alleged to be the property of the plaintiff.

A decree was entered, ordering foreclosure of said mortgage, the sale of the mortgaged property and the payment to plaintiff of one thousand five hundred dollars and interest from the proceeds of the sale. It was also decreed that said sale should be subject to an assessment lien of defendant, Reclamation District 1000, and that plaintiff take nothing as against said Reclamation District.

The appeal is by M. D. Butler, administrator, from the judgment. A reversal is urged upon the sole ground that the findings and the judgment are not supported by the evidence.

The note and mortgage in question were dated March 3, 1908, and the mortgage was acknowledged by James A. Butler on the sixteenth day of the same month. James A. Butler died February 22, 1913, and M. D. Butler was duly appointed administrator of his estate and substituted in the action, and will hereinafter be called the defendant.

It appeared that on October 26, 1907, said Roffy had executed a mortgage in favor of George L. Woodford, but at the date of the trial belonging to James H. Davidson, to secure the sum of one thousand five hundred dollars, said mortgage covering 160 acres of land, of which the 80 acres in question were a part. It was alleged in the answer: "That the said Roffy, with the intent to deceive and defraud said James A. Butler, falsely, fraudulently, and knowingly represented to said James A. Butler that said land was then free and clear from any and all liens and encumbrances," and that James A. Butler did not discover said encumbrance until in the month of April, 1908, at which time he demanded of Roffy the cancellation of the Butler note and mortgage, which was by Roffy refused. Before the trial, plaintiff dismissed the action as to defendant Davidson, who had commenced an action to foreclose his mortgage. As to this, the court found that nothing was due on the Davidson mortgage "and said mortgage constitutes no lien or encumbrance upon said land and the existence of said mortgage constitutes no fraud or deceit upon the mortgagor in said action, and said defendant Butler was not damaged and suffered no damage by reason of said alleged mortgage."

The plaintiff having introduced in evidence the note and the mortgage sued upon and certain written assignments showing that he was the owner thereof and thereupon rested his case, a showing was then made to justify findings sufficient to support the decree. The single question remaining, then, is: Is the evidence presented by the defendant and addressed to the special defense set up in the answer and based upon the ground of fraud such that this court may justly declare that the trial court, in repudiating or disregarding it, abused its discretion or transcended the province (peculiarly that of trial courts) of passing upon questions of the credibility of the witnesses and the weight of the evidence?

The only testimony offered by the defendant and received by the court in support of the special defense was that given by the defendant himself. He testified that he met Joseph T. Roffy in San Rafael at the time the mortgage was executed by his brother to him; that his brother, since deceased, Mr. Roffy and the witness were present; that he met his brother and Mr. Roffy at their request; that they wanted him to look at some papers which they were about to execute. He continued: "They told me that Mr. Roffy was the owner of some land up in Sacramento County and that he was about to trade the land for an automobile that my brother then owned. The automobile was valued by both Roffy and my brother at \$1,500. The land was valued by both Roffy and my brother at \$3,000. They agreed to make the trade—the automobile for the land, with a mortgage back of the \$1,500 on the balance due on the purchase price. They both asked me to look over the papers, which I did. I then informed them both that the transaction was not carried on in a business way, that they should have an abstract of title—search of the title made. Mr. Roffy informed my brother at that time that such a thing would be a needless expense, that he had just had the title searched himself, had the abstract at his place, that he would produce that abstract and would transfer it to my brother, . . . and assured my brother that the land was clear and free of any kind of encumbrance or lien, the title was perfect. . . . My brother said he knew Mr. Roffy for some time; that he was a teacher in the University of California, that he had every faith in him, that it would be a whole lot of red tape and a needless expense to have any search made; that he was perfectly willing to take the statement of Mr.

Roffy that the land was free and clear from any encumbrance." The witness said that so far as he knew his brother never saw an abstract; that about three months later he and his brother visited an attorney who was representing Roffy and that his brother said he wanted his automobile back, and would reconvey the property to Roffy as soon as the note and mortgage were delivered up and canceled. Shortly after that, witness and his brother saw Roffy in San Francisco. He said: "My brother demanded from Mr. Roffy that he deliver back the automobile to him. Mr. Roffy made promises of freeing the land from the encumbrance which was upon it. My brother became a little impatient and told Mr. Roffy that he was tired of waiting, that he had been stalling for two or three months and that he had lost faith in him; that he would wait no longer. . . . I prepared a complaint at that time setting up the fraud and asked for an injunction to prevent Roffy from transferring the automobile or further using it or damaging it and also praying that the note and mortgage be delivered up and canceled. Before that complaint had been verified by my brother or before it had been filed, my brother informed me that Mr. Roffy had disposed of the automobile and that he was unable to locate it." Thereupon, he testified, his brother swore to a complaint charging Roffy with obtaining money under false pretenses and a warrant issued for his arrest, but Roffy had gone to Chicago and the warrant was not served.

It will be noted that it does not clearly appear from the witness' testimony that the deceased never at any time, prior to the consummation of the sale, saw and examined the abstract of title to the land which Roffy said that he had and which he further said he would produce and deliver to the deceased. But, be that as it may, it is, of course, manifest that the court rejected the defendant's testimony, and we can perceive no reason arising from the record before us for declaring, as a matter of law, that the refusal of the court to accept that testimony involved error or an abuse of judicial discretion. Indeed, as we view the proposition, it would be entirely in excess of the just power of a reviewing court to hold that it was the legal *duty* of the trial court to have accepted as verity the testimony of the defendant and upon it predicated a finding that the transaction resulting in the sale of the land to the deceased by Roffy was characterized by such

fraud and deception as would, in equity, vitiate such a transaction.

[1] A trial court is not legally bound to accept all testimony adduced before it at its face value or as conclusive, merely because there is no testimony offered and received in contradiction of it. The manner in which a witness may testify often operates as effectually in the impeachment of the verity of his testimony as would affirmative contradiction thereof by other testimony. The trial court has the witnesses before it and is thus in a position to determine, with at least approximate accuracy, whether a witness' testimony is or is not worthy of that degree of credence necessary to impress it with persuasive or any probative force. [2] The tests available to trial judges and juries for determining questions of fact are obviously not available to reviewing tribunals, and, therefore, when a trial court or jury reach a conclusion upon the facts, such conclusion is rarely reviewable, and only so when the questions of fact are of such a character from the nature of the evidence as to resolve them into questions of law.

[3] In the present case, the trial court acted clearly within its province in refusing to accept the defendant's story, and, as suggested, the situation here is not such as to warrant us in saying that thus it committed error or an abuse of sound judicial discretion.

But the trial court was not required to determine the question whether there was fraud in the transaction on the part of Roffy sufficient to render it nugatory and void by a consideration alone of the defendant's testimony. The plaintiff, in rebuttal, introduced in evidence a number of letters passing between the plaintiff and James A. Butler long after the sale and conveyance of the land to the latter and the mortgage by him given to Roffy on said land to secure payment of his (Butler's) promissory note to Roffy for the purchase price. The contents of the deceased's letters, which formed a part of the correspondence referred to, the trial court could well have considered as rather contradictory to, than confirmatory of, the testimony of M. D. Butler. The subjoined is the important part of said correspondence:

On January 30, 1909, said Butler wrote to plaintiff, saying, among other things: "I am going to try and settle up with

Geo. Woodford regarding the Sacramento land some time, this week, and would like to communicate with you when I do."

To this letter, plaintiff replied on February 4, 1909, as follows: "Not having heard from you in answer to my two previous letters, I was about ready to start foreclosure on the \$1,500 mortgage, signed by you, which I hold against the land near Sacramento. You say you are going to settle up with Woodford this week. Woodford's mortgage is not due for nearly a year yet, while my mortgage was due on Jan. 1st. If you do not care to pay my mortgage and want to get released from the note, I am willing to release you, providing you give me a quit-claim deed to your 80 acres, so that I can clear up the title. If you want to pay the mortgage off and keep the land, and have not all of the cash at this time, I will be willing to accept part of it and wait a short time for the balance. I am willing to do anything that is fair, but something must be done right away. . . . "

On February 9, 1909, Butler answered, saying that he had not received the two letters mentioned by plaintiff, and proceeding: "I was over to see Mr. Woodford today and told him that I was willing to settle with him or you. But that I would like to hear from you first which I think is proper. You say his mortgage will not be due for some time. Now your mortgage is over due and perhaps it would be better to settle with you and you can settle the difference. I now have a check for \$1,000 and will pay Mr. Woodford or you providing things can be arranged. I will be able to pay the balance in a month or so. . . . "

Plaintiff replied on February 19, 1909, stating that he had nothing to do with Woodford's mortgage; that he would send the note and mortgage to the Wells-Fargo Bank, in San Francisco, to be indorsed by the bank upon receipt of one thousand dollars.

On February 24th, Butler wrote: "I am going to deposit \$1,000 this day with the Wells Fargo Bank here in this city. I will instruct them to send you this amount upon receipt of the Release & Mortgage. I will pay you the balance in three or four months. Kindly let me know what rate of interest you intend to charge. I am willing to pay anything that is fair and square."

Later, on the same day, he wrote that the Wells-Fargo Bank refused to accept the money, as plaintiff had no account with

it, but that he had deposited the money with the Anglo-Californian Bank "and if you send your papers to them they will hold them in escrow until your mortgage is satisfied."

Plaintiff, on March 2, 1909, wrote that he was sending the note and mortgage to the Anglo-Californian Bank. He said: "You state that the bank would hold the papers in escrow until the mortgage was all satisfied. This will hardly be necessary, and I would prefer to hold the papers until the balance becomes due. I have drawn an extension agreement, which is signed by myself and acknowledged before a notary public. This I have instructed the bank to deliver to you when you turn over the \$1,000 to them for me. . . . You asked me about the rate of interest on the \$500. I am willing to let it go without interest now that the matter is being settled." The extension agreement referred to in the above letter was to the effect that upon payment of one thousand dollars upon said note and mortgage, payment of the balance of five hundred dollars would be extended to July 1, 1909.

On July 7, 1909, J. A. Butler wrote plaintiff: "Your letter has been received and noted. Let me assure you that I will settle with you in sight of ten days. My money got tied up, otherwise I would have settled before now. Assuring you that I am about to pay you up," etc.

The above letters of the deceased very plainly show that, if he at any time ever believed that Roffy had imposed upon or deceived him as to the title to the land, he must have later satisfied himself that the bargain was all that he could have expected it to be. In none of the letters, it will be noted, did he make any complaint about the transaction or claim that he was induced to enter into and consummate it by any misrepresentations or deception on the part of Roffy. To the contrary, the letters very clearly show that he was anxious to pay his mortgage debt and so retain the land, notwithstanding that he knew, as the letters show, that a prior mortgage to secure an unmatured indebtedness evidenced by a promissory note then subsisted upon the property. It is quite manifest that upon a consideration of said letters the trial court could justly or at least with considerable reason have been inspired with a strong feeling of distrust in the testimony of the witness, Butler.

While thus we have presented and briefly considered some of the considerations upon which the court below might have

been led to reach its conclusion, in the face of the testimony of the defendant, that the transaction between Roffy and the deceased was carried on and completed, so far as Roffy's part therein was concerned, honestly and in good faith and that the purchase of the land by the deceased was not the result of any misrepresentation by the former of the condition of the title either at the time the transaction was under negotiation or when it was finally completed, it has not, under our view of the record, been absolutely necessary that we should have done so, since, as hitherto declared, there would be, even in the absence of the letters referred to from the record, no justification for the conclusion by this court that the result reached by the court below necessarily involved an arbitrary rejection of the defendant's testimony. In other words, as stated in the beginning, there would be in such case no ground upon which we could justly hold that, by disregarding the testimony of the defendant, the court below was guilty of an abuse of discretion.

In view of the conclusion we have arrived at, as indicated above, it is not necessary to consider other assignments involving attacks upon other findings than those just considered. As stated above, the finding that the note and the mortgage were made and delivered as alleged in the complaint is of itself sufficient to support the judgment, and it therefore becomes wholly immaterial whether the prior mortgage was or was not a subsisting lien upon the land at the time of the transaction between Roffy and the deceased, and the finding that it was not is, therefore, also immaterial. Nor, in view of our conclusion as to the evidence, is it necessary to determine whether, to entitle the defendant to maintain his defense upon the ground of fraud, it was necessary for him to rescind the contract of sale, it being contended by the respondent that rescission is a prerequisite to a right of action in such a case and that the same must be kept alive continuously and to the time of the trial, which, it is likewise contended, was shown by the letters above adverted to was not done.

The judgment appealed from is affirmed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

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[Civ. No. 2857. First Appellate District, Division One.—March 18, 1919.]

JOSEPHINE O. SCHUTZER, Respondent, v. EDWARD F. TAYLOR, Executor, etc., Appellant.

[1] PLEADING—CONVERSION—TITLE—STRIKING OUT SECOND DEFENSE—WHEN NOT PREJUDICIAL.—Where, in an action for damages for the conversion of personal property, the matter of plaintiff's title to the property is fully covered and put in issue by the allegations of the complaint and the first defense pleaded, and the court makes a finding thereon, the defendant is not prejudiced by a ruling of the court sustaining a general demurrer to a second defense pleaded which only puts in issue the same matter.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

Chas. W. Kitts for Appellant.

B. L. Husted for Respondent.

KERRIGAN, J.—This is an appeal by defendant from a judgment in an action for damages for the conversion of personal property, and is taken on the judgment-roll alone.

The defendant in an amended answer alleged two distinct matters of defense. To the second of those defenses the trial court sustained a general demurrer, and it is upon the action of the court in this and one other matter that the defendant bases his appeal.

In the so-called second matter of defense the defendant alleges that Michael C. Taylor, his testator, was fraudulently induced to contribute to the support of Emma Onken during his lifetime, and was also fraudulently led to believe that unless he made some provision for her after his death she would be in want of the common necessities of life; that accordingly he caused a certificate for sixteen shares of the capital stock of the Spring Valley Water Company (which is the property here in dispute) to be issued in the name of Emma Onken, with the understanding that the title and possession thereof

were to remain in him until his death, when said shares of stock were to become the property of said Onken; that upon the issuance of said certificate it was delivered to said Taylor, and that it remained in his possession until he died. It is also alleged that Emma Onken died before M. C. Taylor, and that plaintiff herein acquired said shares of stock with notice of all the circumstances herein related, and that hence she has no valid title to the property.

According to these allegations of the second defense it would appear that no valid gift of the shares of stock was made by Taylor to Onken, and that plaintiff's title is no better than that of Onken, which would constitute a good defense to plaintiff's cause of action. [1] But as it also appears from the record that the matter of plaintiff's title to the property was fully covered and put in issue by the allegations of the complaint and the first defense pleaded, and that the court made a finding thereon, it follows that the defendant was in no manner prejudiced by the ruling complained of.

We think also that the findings of the court are responsive to the issues made by the pleadings, and that they fully support the judgment.

The judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 2745. First Appellate District, Division Two.—March 18, 1919.]

EMILIO OLCESE, as Administrator, etc., Respondent, v.
JAMES H. HARDY, Appellant.

- [1] EVIDENCE — CONTRADICTIONARY STATEMENTS — WEIGHT.—Contradictory statements of the plaintiff in an action for damages for personal injuries do not necessarily nullify his testimony; but the weight to be given it might be lessened by such contradictions or the jury might reject the testimony entirely.
- [2] *Id.*—DUTY OF APPELLATE COURT.—It is the duty of an appellate court to reconcile apparent contradictions in evidence whenever possible.

- [3] **NEGLIGENCE—ACTION FOR PERSONAL INJURIES—ASSUMPTION OF RISK—DEFENSE.**—In an action against the employer for damages for personal injuries received while the Roseberry Act was in force, evidence going to the defense of assumption of risk by the employee could be of no avail to such employer.
- [4] **EVIDENCE—CONFLICT—APPELLATE REVIEW.**—Where there is a substantial conflict in the evidence, the appellate court is precluded from disturbing the verdict.
- [5] **ID.—SUFFICIENCY—VERDICT.**—There is no fixed standard for the sufficiency of evidence to induce belief, and unless the evidence so clearly preponderates against the verdict that the court cannot conclude that the verdict was the result of a due consideration of the evidence, the verdict will not be disturbed.
- [6] **NEGLIGENCE—ACTION FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—DIMINISHED DAMAGES.**—Where, in an action by an employee against the employer for damages for personal injuries received while the Roseberry Act was in force, the court instructed the jury that the fact that such employee might have been guilty of contributory negligence would not preclude a recovery if such negligence was slight, while that of the employer was gross in comparison, but that the damages might be diminished by the jury in proportion to the amount of negligence attributable to such employee, the appellate court must assume in support of the judgment that if the evidence in any particular did show negligence on the part of the employee, the jury made the proper deduction therefor in arriving at its verdict.
- [7] **ID.—ACTION FOR PERSONAL INJURIES—PLEADING—PROOF.**—Where, in such an action, the general allegations of negligence are followed by an enumeration of specific acts, the plaintiff will not be limited to proof of specific acts unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge. Affirmed.

The facts are stated in the opinion of the court.

James Alva Watt, Rolla Bishop Watt and Watt, Miller, Thornton & Watt for Appellant.

Sullivan & Sullivan and Theo. J. Roche for Respondent.

LANGDON, P. J.—This action was instituted by the plaintiff's intestate, Louis Burger, against the defendant for dam-

ages for personal injuries alleged to have been received by Burger through the carelessness and negligence of the defendant while Burger was in the employ of the defendant. Burger having died on the twentieth day of July, 1915, the plaintiff above named, as administrator of his estate, was substituted as plaintiff. The defendant answered denying any carelessness or negligence and setting up as a separate defense that the accident and injury were due solely to the carelessness of Burger. The jury rendered a verdict for the plaintiff and judgment was rendered thereon in the sum of \$5,750, from which judgment the defendant appeals. Appellant contends that the judgment should be reversed on the grounds that the evidence is insufficient to justify the verdict and errors in law occurring at the trial.

The appellant argues at some length the insufficiency of the evidence to justify the verdict. He admits that the evidence of Burger given on his direct examination is sufficient to raise a conflict in the evidence and consequently to preclude this court from reviewing the evidence, but contends that Burger contradicted this testimony on cross-examination and at the taking of his deposition before the trial, and that, therefore, this testimony is without weight; and that without this testimony there is no evidence to support the verdict of the jury.

[1] We do not believe that contradictory statements of plaintiff, if there are any, necessarily nullify his testimony; the weight to be given it might be lessened by such contradictions or the jury might reject the testimony entirely, but the fact that the jury found for the plaintiff conclusively shows that they accepted his statements on direct examination as true. But admitting that there are conflicts and contradictions in his testimony, and considering that portion of his testimony which is least favorable to his contention, it seems to us that this court would not be justified in reviewing the evidence under the record in this case. Construing the portions of plaintiff's testimony which are quoted in the briefs of appellant and urged as contradictory most strongly against plaintiff, we shall proceed to analyze the testimony.

The facts are briefly these: The defendant was engaged in the lumber and mill business in San Francisco. Louis Burger entered his employ and operated a rip saw machine for a few weeks, after which he was made the working foreman of the mill and was placed in charge of a machine known as a

"sticker machine." His work consisted in feeding the boards into the machine; the boards would then pass under the revolving rollers and move toward the revolving head, which made approximately three thousand two hundred revolutions a minute. To this revolving head were attached removable blades of various shapes and these blades or knives would cut or plane or curve, as occasion required, the pieces of lumber passing under the revolving head. When Burger took charge of the machine there were certain blades there for use in the operation of the machine. Burger tried all of the blades, but claimed that a certain type of thin hard blade among the blades provided was the only type of blade with which the quantity of work expected to be done could be obtained. It was this type of blade which flew off the head and inflicted the injury upon Burger. In his direct examination Burger testified that within a few weeks after he took charge of the sticker machine he informed the defendant that the head was defective and asked him to get a new one. He testified that he told the defendant that the head had nicks in it that made it unsafe. He also testified that he suggested that an iron cylinder head in which the blades drop in a slot be obtained, and that the defendant promised to get a new head for the machine. Burger also testified in his direct examination that on many occasions prior to the happening of the accident these blades, clamped as they were to the head, worked loose while the head was revolving and flew out some distance from the machine, and that Burger called the attention of the defendant to this, and that the defendant himself was present and saw the blades fly out on several occasions. Burger also testified that the defendant inquired of him how the danger from flying blades could be overcome, and that he (Burger) directed his attention to a new type of sticker machine which was being generally used by mills in San Francisco; the defendant asked if the old machine could not be changed so as to overcome the danger, and Burger told him that that was impossible. The defendant then told Burger that when business got a little better, he thought he could afford the new type of machine. The accident happened on April 16, 1913. On the evening of April 15, 1913, the defendant told Burger that there was some "stuff" to be worked on the next morning and to force the work as much as possible. On the morning of the accident, Burger arrived at

his work about 8 o'clock. He was using a thin hard blade in the machine, one which had been in use in the machine the previous afternoon. After operating the machine for about twenty minutes the accident occurred. The blade became loosened and flew out and struck Burger in the head, inflicting serious injury upon him.

We now come to a consideration of the cross-examination of the plaintiff, which it is claimed by appellant completely destroys the force of the evidence upon the direct examination. It is first claimed by appellant that the cross-examination shows that Burger himself purchased the particular blade which caused the injury. The evidence only goes to the extent of showing that Burger, acting for his employer, purchased the particular blade which was used on the day of the accident to replace others of the same pattern which had become worn. It does not contradict the testimony elicited in the direct examination that the form of blade was among the original blades furnished Burger by the defendant, and that Burger was not responsible for its introduction into use in defendant's business.

As opposed to Burger's testimony on direct examination to the effect that the head of the machine was defective, appellant points out that Mr. Burger testified on his cross-examination that an inspector for an insurance company made an inspection of the mill, including the sticker machine by the operation of which the plaintiff was injured, and the inspector and Burger talked of what changes of importance should be made in and about the sticker machine to make it safe; and that Burger did not inform the inspector of any defects in the head or blades or hood of the machine. While, of course, the fact that he did not make known these defects to the inspector is persuasive of the fact that they did not exist to his knowledge at the time, it is not direct evidence upon that fact, and we cannot say that it is directly contradictory of the evidence given on the direct examination, that the defects did exist. It is entirely possible for the defects to have existed and yet for the plaintiff not to have mentioned them to the inspector. [2] And it is the duty of an appellate court to reconcile apparent contradictions in evidence whenever possible.

Appellant next argues that the cross-examination shows that Burger had full authority to make purchases and was in full

charge and control of the mill. There is some testimony from which the jury might have taken this view of the matter, but there is also testimony to the effect that Mr. Hardy was consulted, and that he authorized the purchase of all supplies when such purchases were made, and there is testimony in regard to numerous conversations between Mr. Burger and Mr. Hardy concerning changes in the revolving head and in the machine, from which the jury might have believed that Mr. Burger's authority in making purchases and changes was a very limited authority. Under these circumstances, we do not think that we can interfere with the implied finding of the jury in regard to this matter.

Appellant refers to certain testimony elicited upon cross-examination, showing, he contends, that Burger was fully informed of the defects in the machine and that he continued to operate the machine after such knowledge. This would go to the defense of assumption of risk if that defense had been open to the defendant at the time of the accident. However, the Roseberry Act [Stats. 1911, p. 796] was in force at the time of the accident, and abolished this defense. [3] Therefore this testimony can be of no avail to appellant.

It is argued that the testimony shows that the knife which injured Burger came loose, not because of any defect in it, but because of Burger's failure to tighten the nut and bolt that held it in place. This question was one for the jury, along with the general question of Burger's negligence in all particulars connected with the accident. We cannot disturb its finding thereon. It is the province of the jury to draw deductions from testimony, but the appellant overlooks this and asks us to decide from the testimony that the accident could not have occurred if a certain blower or hood attached to the machine had been down at the time the blade flew out. The jury was taken to the scene of the accident and examined the machine in question; they had before them evidence to the effect that the hood was merely for the purpose of catching shavings; that the hood was defective and difficult to pull down; that it interfered with the speed of the machine, and that Burger had been requested to hasten with the work, and other similar matters. This question is again a part of the larger question of whether or not Burger had been negligent, and, as stated before, we cannot interfere with the finding

of the jury upon this subject, so long as there is any substantial conflict of the evidence.

[4] We have discussed the evidence at this length in an effort to demonstrate that even if we construe the conflicts in Burger's testimony most strongly against him, yet there remains a substantial conflict in the evidence which will preclude us from going into the questions involved. Upon appeal, in this state, if there is any evidence to justify the verdict it cannot be disturbed. [5] There is no fixed standard for the sufficiency of evidence to induce belief, and unless the evidence so clearly preponderates against the verdict that the court cannot conclude that the verdict was the result of a due consideration of the evidence, the verdict will not be disturbed.

Appellant contends that the verdict is against law in certain particulars specified in his brief. Upon these matters, we have found the evidence conflicting. The instructions of the court fully covered the points and stated correctly the law to the jury. We must assume that the jury followed these instructions, and found the facts to be such as to justify their verdict in the light of the law contained in the instructions. Furthermore, the jury was instructed in conformity with the Roseberry Act, that the law of this state provides that in an action to recover damages for a personal injury sustained within this state by an employee, while engaged in the line of his duty or in the course of his employment as such employee in which a recovery is sought upon the ground of want of ordinary care of the employer or of any officer, agent, or servant of the employer, the fact that such employee may have been guilty of contributory negligence—if such negligence was slight, while that of the employer was gross in comparison—will not preclude a recovery, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee. [6] We must assume in support of the judgment that if, as the appellant contends, the evidence in any particular did show negligence on the part of Burger, that the jury made the proper deductions therefor in arriving at its verdict.

A number of alleged errors in the admission and exclusion of evidence are urged. On direct examination Burger was explaining the different kinds of knives which might be used in sticker machines, such as he was operating at the time he was injured. Defendant objected to a question wherein

Burger was asked whether the defendant had furnished a certain type of high-tempered steel blade, which the plaintiff had previously testified was used by almost every mill in San Francisco. Defendant objected to the question and answer for the reason that the witness had previously testified that that type of blade was so soft that "if a man runs one hundred feet with one of them without stopping to sharpen, he is absolutely lucky," and also because the witness had previously testified in relation to the same type of blade that he did not believe that the blades could have been bought at the time of the accident. Appellant urges that by permitting the question to be answered by the witness, the court left it to the jury to infer that because the blades referred to were not furnished, the defendant was guilty of negligence, and that such an inference was not warranted in the light of the fact that Burger himself had testified that the blades were soft and unsuitable for his work, and that it was unlikely that they could have been procured by the defendant. If this was error, it was not prejudicial to the defendant because the jury had before them all the statements of Burger as to the blades, the uncertainty of procuring them, etc. If it drew inferences from the testimony, we must assume it drew inferences based upon all the testimony presented, and that it considered the statements of Burger with regard to the impracticability of these blades and to the improbability of being able to procure the same, in connection with his statement that they had not been furnished by the defendant.

The legal propositions urged by appellant in arguing his objections to this and other evidence are the same propositions which he has urged elsewhere, and, as stated before, we believe these matters were fully and fairly covered by the instructions of the court.

While Burger was testifying the court asked him a question regarding the position of the blade or knife. Burger answered this question, and after answering it, proceeded with a lengthy explanation concerning his adjustment and operation of the machine on the day of the accident. In this explanation he mentioned certain defects in the blower or hood of the machine which he stated prevented it from being pulled down. Defendant objected for the reason that the defects in the blower or hood were not relied upon in the complaint, and that this matter was not within the issues. A portion

of the answer of Burger was responsive to the question and to the issues in the case. The motion was to strike out the entire answer, and we think it was properly denied. But apart from this reason, we think that the evidence was properly admitted. The amended complaint alleged: "That on said April 16, 1913, said sticker with the said steel blades attached thereto was defective and dangerous and insecure and was unsafe and dangerous . . ."; and also that "through the carelessness and neglect of the defendant to furnish a safe sticker and blades therefor, one of said blades became detached and broke." Here is an allegation of defective machinery, as well as a later allegation of special defects in the blades attached thereto. The case of *Monaghan v. Pacific Rolling-Mill Co.*, 81 Cal. 190, [22 Pac. 590], holds that where there is an allegation of defect in machinery, the cause of action is not limited to a defect in one part thereof. [7] Where general allegations of negligence are followed by an enumeration of specific facts, the plaintiff will not be limited to proof of specific acts unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts. (*United States Exp. Co. v. Wahl*, 168 Fed. 851, [94 C. C. A. 260]; *Traver v. Spokane St. Ry. Co.*, 25 Wash. 225, [65 Pac. 284]; *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 193, [111 Pac. 519, 527].)

The appellant urges several objections to evidence on the ground that the questions and answers had the effect of informing the jury that an insurance company was interested in the litigation and consequently of prejudicing the jury in favor of the plaintiff. While this testimony may have had that effect, incidentally, it becomes unnecessary for us to decide whether or not errors occurred in its admission, for the reason that the defendant could not have been prejudiced, because the defendant himself introduced considerable evidence showing that an insurance company was interested in the case. It brought out upon cross-examination of Burger that an inspector for an insurance company had visited the mill and examined the machinery for defects; also that a few days prior to the accident a letter was written to the insurance company stating that all the defects in the plant had been remedied.

There are several other specifications of error in the rulings of the trial court upon evidence, all of which we have ex-

amined and find them to be without merit. It is unnecessary to discuss them separately here. From an examination of the entire record it appears that substantial justice has been done between the parties.

The judgment is affirmed.

Brittain, J., and Haven, J., concurred.

[Civ. No. 1997. Third Appellate District.—March 19, 1919.]

ARGYLE DREDGING COMPANY (a Corporation), Petitioner, v. **JOHN S. CHAMBERS**, as Controller, etc., Respondent.

- [1] **RECLAMATION BOARD ACT—NATURE OF DISTRICT—FORMATION—POWER OF LEGISLATURE.**—Reclamation districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose. It would be perfectly legal and competent for the legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors.
- [2] **CONSTITUTIONAL LAW—SPECIAL LAWS—LEGISLATIVE POWER.**—The constitution does not deprive the legislature of the power to pass all special acts; but forbids special laws in all cases where a general law can be made applicable.
- [3] **RECLAMATION BOARD ACT—SACRAMENTO AND SAN JOAQUIN DRAINAGE DISTRICT—PURCHASE OF WARRANTS BY STATE—SPECIAL LEGISLATION.**—The act of January 30, 1919, "authorizing the State Board of Control to purchase warrants of the Sacramento and San Joaquin Drainage District issued in payment for the expense of continuing the construction of the east levee of the Sutter By-pass; appropriating money therefor, and providing reimbursement to the State of such appropriation," is not unconstitutional as violative of section 25, article IV, of the state constitution, which prohibits special laws in all cases where a general law can be made applicable.
- [4] **ID.—LENDING CREDIT OF STATE—MAKING GIFT—CONSTITUTIONALITY OF ACT.**—Such act of January 30, 1919, does not violate section 31, article IV, of the state constitution, which prohibits the giving or lending the credit of the state or making a gift "to any individual, municipal or other corporation whatever."

[5] ID.—ACT OF JANUARY 30, 1919—CONSTRUCTION OF—EFFECT OF APPROPRIATION OF MONEYS.—Such act of January 30, 1919, is neither more nor less than an act authorizing the state board of control to invest state money in the warrants duly and regularly issued under the act. The fact that an appropriation of moneys was made to meet the anticipated purchase did not affect the power of the legislature to make the appropriation or the power of the board to make the investment.

PROCEEDING in mandate originally instituted in the District Court of Appeal to compel the state controller to issue his warrant in payment of petitioner's claim. Peremptory writ ordered issued.

The facts are stated in the opinion of the court.

James S. Spillman and Chas. H. Oatman for Petitioner.

John W. Carrigan and Jas. L. Attridge for Respondent.

U. S. Webb, Attorney-General, for State of California.

Robt. T. Devlin, *Amicus Curiae*.

CHIPMAN, P. J.—This is an application for a writ of mandate compelling the controller to issue his warrant for the payment of plaintiff's claim. As the matter was one of emergency and as at the argument we were fully convinced that the writ should issue, it was so ordered from the bench. By the request of all parties we will state the case and the reasons for our conclusion.

It appears from the petition as follows: That the Sacramento and San Joaquin Drainage District is "a body politic and corporate created by the act of the legislature of this state, approved December 24, 1911" (Stats. 1911, Extra Session, p. 117), as amended and supplemented by the act of May 26, 1913 (Stats. 1913, p. 252), and was further amended and supplemented by the act of June 9, 1915 (Stats. 1915, p. 1338), which said act of 1911, as amended by said act of 1915, "is known and designated and referred to as the 'Reclamation Board Act' as provided in section 31 of said acts as so amended and supplemented"; that the reclamation board referred to in the petition was created and exists as provided for in said Reclamation Board Act; "that the man-

agement and control of the said Sacramento and San Joaquin Drainage District is by virtue of section 5 of said Reclamation Board Act vested in the said reclamation board." We quote from the petition:

"V.

"That pursuant to the provisions of said Reclamation Board Act the said Reclamation Board did, in accordance with the provisions of section 13 of said Reclamation Board Act, adopt and determine upon a certain portion or project of the plans to be carried out by said Board and did designate the same by the name and number of 'Sutter-Butte By-pass Project Number Six' and did pass its order and resolution for the levying of an assessment in the sum of more than \$10,000,000.00 upon the lands within said Sacramento and San Joaquin District to be benefited thereby, as might be determined in the manner provided by law, and did direct that said assessment be known and designated as 'Sutter-Butte By-pass Assessment Number Six,' and did appoint three assessors for the purpose of making said assessment, all in the manner required and provided by said Reclamation Board Act.

"VI.

"That a part of the said Sutter-Butte By-pass Project Number Six so adopted and determined upon by said Reclamation Board is the construction of a levee along the East line of a by-pass in Sutter Basin, in Sutter County, California, known as the Sutter By-pass, the said levee being known and designated as the East levee of the Sutter By-pass.

"VII.

"That after the adoption of said Sutter-Butte By-pass Project Number Six the said Reclamation Board, acting for and on behalf of the said Sacramento and San Joaquin Drainage District, entered into a contract with your petitioner for dredging work to be done by the dredger Argyle in and about the construction of the said East levee of the Sutter By-pass. That pursuant to said contract, and in the summer of 1918, your petitioner commenced work upon said East levee of the Sutter By-pass with the said dredger Argyle, which work has been prosecuted continuously ever since. That on the 1st and 2d days of February, 1919, your petitioner, pursuant to said contract, performed work upon the construction of the said East levee of the Sutter By-pass, for which work so performed on said two days your petitioner was entitled to be paid by

said Reclamation Board for and on behalf of said Sacramento and San Joaquin Drainage District the sum of \$255.00 according to the terms of said contract.

“VIII.

“That thereafter the claim of your petitioner for said sum of \$255.00 against the said Sacramento and San Joaquin Drainage District, acting by and through the Reclamation Board, was duly presented to and allowed by the said Reclamation Board, and was thereafter submitted to the State Board of Control for its scrutiny and approval, and was thereafter approved by the said State Board of Control, and thereafter, and on February 20th, 1919, a warrant numbered 24,274, was duly drawn by the State Controller upon the State Treasurer in favor of your petitioner for said sum of \$255.00, payable out of the said Sutter-Butte By-pass Assessment Number Six, for the amount of the said claim of your petitioner, which said warrant was thereupon and on said day by the said State Controller delivered to your petitioner and was by your petitioner on February 21st, 1919, presented to the State Treasurer for payment, but there were no funds in the hands of the State Treasurer to pay the said warrant when so presented, and the said State Treasurer did thereupon register the said warrant and did endorse on said warrant the date of said presentation and the fact that it was not paid for want of funds, all as provided in and by Section 15 of the said Reclamation Board Act.

“IX.

“That the Legislature of this State now in session passed an act entitled, ‘An act Authorizing the State Board of Control to purchase Warrants of the Sacramento and San Joaquin Drainage District Issued in Payment for the Expense of Continuing the Construction of the East Levee of the Sutter By-pass; Appropriating Money Therefor, and Providing for Reimbursement to the State of such Appropriation,’ which said act was approved by the Governor of this State on January 30th, 1919. That a copy of said act is hereunto annexed and marked Exhibit ‘A’, and is hereby referred to and made a part hereof. That said Legislature did, in Section 6 of said act, declare that it deemed it necessary for the immediate preservation of the public health and safety that said act should go into immediate effect, and did in Section 6 of said act set forth a statement of the facts constituting such

necessity, which said Section of said act was passed by each house of said Legislature upon an aye and nay vote upon a separate roll call thereon, as provided by Section 1 of Article IV of the Constitution of this State. That it was further determined and declared by said Legislature in and by Section 6 of said act, that said act constituted an urgency measure which under the provisions of Section 1 of Article IV of the Constitution of the State of California should go into immediate effect; and that said act did go into effect immediately upon the signing and approval of the same by the Governor of this State on January 30th, 1919.

“X.

“That on February 27, 1919, your petitioner, being then the owner and holder of said warrant for \$255.00 payable out of the said Sutter-Butte By-pass Assessment Number Six, did offer to sell said warrant at par to the State Board of Control, pursuant to the provisions of said last named act; and the said State Board of Control did thereupon and then and there accept said offer, and did purchase said warrant from your petitioner at the price of \$255.00, being the par value thereof, and did prepare and approve a claim in favor of your petitioner for said sum of \$255.00 in payment therefor, payable out of the appropriation of \$300,000 made by said last named act, and did present said claim to the respondent, John S. Chambers, who is and then was the Controller of the State of California, and did request said respondent as such Controller to draw a warrant upon the State Treasurer payable out of said appropriation of \$300,000 for the sum of \$255.00 in favor of your petitioner, in payment of the purchase price of said warrant of like amount so purchased by said Board of Control as aforesaid. That said respondent as such State Controller then and there refused and still refuses to draw said warrant as so requested by said Board of Control, or otherwise, or at all.

“XI.

“That said appropriation of \$300,000 was so made by said act of January 30th, 1919, there was in the State Treasury, and not otherwise appropriated, a sum of much more than said sum of \$300,000. That no part of said appropriation of \$300,000.00 made by said last named act has ever been drawn or expended, but the same remains in the State Treasury subject to the provisions of said act.

"XII.

"That the drawing of said warrant as so requested by said State Board of Control is an act which the law specially enjoins upon the said respondent as such State Controller as a duty resulting from his office."

A demurrer to the petition was interposed by respondent on the following grounds:

1. That the act of January 30, 1919, violates section 21 of article I of the constitution of the state of California, in that it is class and special legislation; that it is giving or lending the credit of the state in violation of section 31 of article IV and in making an allowance for compensation on a contract for services rendered under contract unauthorized by law.

2. That it cannot be ascertained from the petition who is the real party in interest.

3. That the petition does not state facts sufficient to constitute a cause for granting the writ prayed for.

The insufficiency of the facts or the failure to disclose who is the real party in interest was not seriously urged. Nor do we think either point well taken. Unless the act in question is unconstitutional, *mandamus* is the appropriate remedy and the facts alleged were sufficient to justify the issuance of the writ. It clearly enough appears that petitioner is the real party in interest.

Is the act of January, 30, 1919, violative of the constitution? It becomes necessary to ascertain the nature and character of the Sacramento and San Joaquin Drainage District.

The validity of the Reclamation Board Act is not called in question. The constitutionality of acts of this character was established and set at rest in the case of *People ex rel. Chapman v. Sacramento Drainage District*, 155 Cal. 373, [103 Pac. 207].

The origin, administrative and legislative history of the Reclamation Board Act, its nature, and character were concisely stated at the argument by Mr. Robert T. Devlin, who appeared *amicus curiae*. The statement accords with our information upon the subject, and we, therefore, take the liberty of using it. We quote from the notes written by our stenographic reporter:

"The problem of flood control has been a problem that has engaged the United States government and the state of California for more than half a century. For the last fifty years

the United States government has been engaged in studying the flood condition of the Sacramento Valley, for the purpose of preventing floods and increasing the navigability of the river. The state of California has been engaged in the same work. They sent for Mr. Eads, who had control of the Mississippi River, to come to California and make a report. He reported a plan for the improvement of the Sacramento River to prevent the very things that this act now before us was to do. The United States government made its report through Col. Mendel and others. In 1893 the debris commission was formed; first, to see that hydraulic mining should not be continued without permits; and, second, to take steps to restore the navigability of the river to the condition which it was in 1851 or 1852, about the time California was ceded to the Union. California again, when Governor Pardee was governor, provided for a commission and invited three engineers to come to California, one of them being Colonel Dabney, having charge of the Mississippi work. They made a report. The United States government was investigating this matter all the time and finally there culminated what is called the Captain Jackson report, which was made in 1911. That report was a report having for its object three things; first, the restoration of the navigability of the Sacramento River; secondly, the prevention of disastrous floods; and thirdly, incidentally, the reclamation of private land. That report, Document 81, said that those three objects were inextricably involved, so you could not improve flood conditions and the navigability of the stream without aiding the land owner. The matter was of such importance to the state of California that Governor Johnson, in convening the legislature in special session, made it as one of the objects to be legislated upon. He named eight or nine objects of such importance to the people that the legislature should be convened for the purpose of considering them, and one of the objects was the consideration of the report of Captain Jackson. At the special session in 1911 the legislature of this state adopted that report of Captain Jackson as a part of the state policy and declared that part of the work should be carried out. In 1911, in pursuance of that plan, the state of California constituted the reclamation board and provided for the appointment of three commissioners and provided that all future works in California should be in conformity with that report.

Two years following, the state of California created the Sacramento and San Joaquin Drainage District, referred to in this petition, being a territory including the Sacramento and San Joaquin Valleys determined by state engineers as being territory subject to flood control and flood injury and provided that that board might carry on the work which is described in this petition. Subsequently, in 1917, the national Congress adopted the Jackson report and appropriated six million some odd thousand dollars for the purpose of carrying it out, to be used in conjunction with appropriations of like amounts made by the state of California, with the provision on the part of the United States government that the obligation of the United States should not exceed one million dollars per year. The state of California has made those appropriations, and to-day and for the last several years past, as a part of this work, the United States government and the state of California are co-operating in the lower parts of the Sacramento River in widening the river and in deepening its channel. Now, this work is all one project. This Sutter bypass taps the river at the north, conducts the water out through two series of levees to be built, making an adjoining river or an additional river, carries it down to the Fremont weir, clear across the Sacramento River into the Yolo Basin and down to tide water. This work is carried out exclusively by a state agency and by a state board. Captain Jackson's report stated that, roughly speaking, the obligation resting upon the United States and the state of California and upon the land owners might be divided into three parts, so the nation would pay one-third, the state one-third, and the land owners one-third, and that the total estimated cost of the entire project would be thirty-three millions of dollars, placing upon the state of California as a direct responsibility eleven million, upon the United States a like sum of eleven million dollars, and upon the land owners eleven million dollars. Owing to the fact that work progressed from time to time and a certain part of the work was done by private owners, this was reduced to a little more than eighteen million dollars, and upon that basis of eighteen million dollars the Congress of the United States has already appropriated one-third, six million dollars, binding the United States government to contribute over six millions to this work. . . .

"Some twenty-five or thirty years ago, the state of California tapped the Sacramento at Tisdale weir, by building a weir that allows the water to escape from the Sacramento River when it reaches a certain height, and that is the water that is doing the damage. By the state's action this water is taken out of the Sacramento River and thrown upon that territory on the east. For the purpose of taking care of that water, these by-passes are being constructed. If these by-passes are not constructed, this water that the state of California takes out of its own volition—nobody else has control of it—is taken out and dumped upon private land—up to some years ago, upon the lands known as District 1500, now upon the lands in District 1. In other words, the floods in that section are caused by the state government in taking water out of the river and dumping it on private lands. For the purpose of performing that governmental duty, the state of California is now building these by-passes. It has spent already more than one million dollars and has obtained the money by using its warrants, which warrants have been taken by private persons. We have now reached the point where private persons refuse to take warrants further."

It is well to recall what the supreme court said in *People v. Sacramento Drainage District*, *supra*, in speaking of districts of the character of the one here. [1] Said the court: "It is unnecessary to repeat the reasons set forth for the decisions in those cases (cases cited), by which the conclusion there reached was expressed, to the effect that such districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose. But, additionally, it may be said that the likeness of these agencies to corporations is superficial, and that the similitude—for it is no more than this—ceases, if consideration be paid to the fact that the state could accomplish this very work without organizing a district as such at all, and without giving the land owners within the district any voice in the selection of the managers or trustees. Thus it would be perfectly legal and competent for the legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors."

The act of 1911 created the reclamation board to consist of three members; adopted the plan of the California debris commission, empowering the board to make modifications, as a general scheme for reclamation flood control in the Sacramento Valley. The act of 1913 enlarged the board to seven members, created the San Joaquin and Sacramento Valley drainage district, and authorized the reclamation board to go forward with the construction of the project and to levy assessments on lands in the district in aid of that purpose. The act provided that in the carrying out of the work the board should divide it into separate projects or divisions, each to be taken up separately and a separate assessment levied therefor, each such project to have a distinctive name and number and its funds to be held separately.

These assessment funds are to be collected by the county treasurers in the counties affected and by them to be deposited in the state treasury and paid out by the state treasurer on warrants drawn by the controller against the state treasurer, as directed by the reclamation board, payable out of that particular assessment in each such separate project. Warrants may be drawn against any assessment whenever it has been ordered by the reclamation board and the assessors have been appointed; these warrants may issue for work before the assessments are collected and when thus drawn may be presented to and registered by the state treasurer, who is authorized to register them and indorse them "not paid for want of funds," and they shall thereafter bear interest from date of registration.

As alleged in the petition, the reclamation board adopted a project, known as Sutter-Butte by-pass project No. 6, and levied an assessment for its construction, known as Sutter-Butte by-pass assessment No. 6, and appointed the assessors therefor. At this stage the controller was authorized to draw warrants for construction work against this assessment on the request of the reclamation board, in anticipation of collections on the assessment. The reclamation board was able to make contracts for work on the east levee of this by-pass, being part of the project No. 6, payable in warrants against its assessment No. 6. Arrangements were made whereby private interests cashed these warrants to a very considerable amount. This arrangement having ended and the necessity for the

uninterrupted prosecution of the work being imperative, the act of January 30, 1919, was passed to meet the emergency.

This act, in effect, appropriated the sum of three hundred thousand dollars, and authorized the state board of control to purchase at their face value (to the extent of not exceeding said amount) any or all warrants of said drainage district drawn by the state controller, as provided by the Reclamation Board Act and payable out of said assessment and "issued in payment for the expense of continuing the construction of the east levee of the Sutter by-pass." Section 5 of said act provides: "The State Controller shall draw warrants upon the State Treasurer, payable out of said appropriation, in such amounts and at such times and in favor of such persons as the Board of Control may request, and the State Treasurer shall pay the same." After the passage of this act, petitioner, Argyle Dredging Company, continued to work under contract with the reclamation board and the claim here was allowed for \$255 for such work. It was duly allowed by the reclamation board and approved by the board of control, the state controller drew and issued to petitioner his warrant against the reclamation board's assessment No. 6, for \$255, and it was registered by the state treasurer as not paid for want of funds. No question arises as to the regularity of the proceedings. The state board of control, however, contracted with petitioner, proceeding under the act of 1919, to purchase this warrant at its face value, and requested the state controller to direct the payment out of the fund thus appropriated. This the controller refused to do and hence the action.

[2] The constitution does not deprive the legislature of the power to pass all special acts. It forbids special laws in all cases where a general law can be made applicable. (Sec. 25, subd. 33, art. IV.) It was said by the supreme court: "The legislature must, in the first instance, determine whether or not a general law can be made applicable in the particular case. The court will not interfere with its judgment on the subject, unless it clearly and beyond a reasonable doubt appears that it adjudged contrary to the fact." (*Wheeler v. Herbert*, 152 Cal. 224, 232, [92 Pac. 353, 357], citing cases.) It does not appear and it is not claimed that conditions such as prevail in the Sacramento and San Joaquin drainage district exist elsewhere in the state, nor do we think that a gen-

eral law could reasonably be made applicable. But as was said in *People v. Mullender*, 132 Cal. 217, 222, [64 Pac. 299, 301]: "We certainly would not hold such a law invalid merely because it would, in our opinion, have been possible to frame a general law under which the same purpose could have been accomplished." It was also there said: "The language of said paragraph (sec. 25, art. IV) plainly implies that there can or may be cases where a local or special act may be wise and salutary and appropriate, and in no wise promotive of those evils which result from a general and indiscriminate resort to local and special legislation."

[3] Such, in our judgment, is the case here.

[4] In no just sense can the act be said to violate section 31, article IV, which prohibits the giving or lending the credit of the state or making a gift "to any individual, municipal or other corporation whatever." As we have seen (*People v. Sacramento Drainage District*, 155 Cal. 373, [103 Pac. 207]), reclamation districts "are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishing its purpose." So completely are these districts so regarded, as we are informed, that their warrants are not taxable nor is the interest payable on those warrants taxable by the United States as income; so, also, are the salaries of the officers of such districts not subject to the payment of an income tax for the reason that the government regards them as part of the state.

Much more closely is the Sacramento and San Joaquin drainage district knitted to the state and really part of it than is the ordinary drainage district. Section 7 of the Reclamation Act of 1915 declares that "the State of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels and basins mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed or subject to overflow by said streams, . . . and it shall be the duty of the reclamation board at all times to enforce on behalf of the State of California and the people thereof the erection, maintenance and protection of such levees . . . as will, in their

judgment, best serve the interests of the State of California. The purposes and objects of this act are to carry into effect the plans of the California Debris Commission with such modifications and amendments and such additional plans as have been or may hereafter be adopted by the reclamation board for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries and said basins and to vest in said reclamation board control and jurisdiction over said plans."

We then have an institution, a state agency, created by the state, under the exclusive control and management of the state, administered by officers appointed by the Governor of the state, and engaged in an enterprise of state-wide concern—the act itself providing that "The State of California and the people thereof are hereby declared to have a primary and supreme interest" in its objects and purposes.

[5] But, aside from these considerations, we think the act of January 30, 1919, is neither more nor less than an act authorizing the state board of control to invest state money in the warrants duly and regularly issued under the act precisely as that board may now and has been since its organization authorized by law to invest state funds in United States and state bonds, municipal bonds, school district bonds, highway and irrigation district bonds. The state has simply added another class of securities in which the board of control may invest state funds. The fact that an appropriation of moneys made to meet the anticipated purchase, in this particular instance, does not affect the power of the legislature to make the appropriation or the power of the board to make the investment. The act specifically provides for the payment of these warrants out of assessments, when collected, and when paid, the money goes back into the state treasury just as it would upon payment of any of said bonds purchased by the board of control.

In no view of the case can we see that either the legislature or the board of control has exceeded its authority. The demurrer is overruled and it is ordered that the peremptory writ prayed for be issued.

Burnett, J., and Hart, J., concurred.

[Civ. No. 2833. First Appellate District, Division One.—March 19, 1919.]

CAROLINE L. SCARPA, Respondent, v. JOSEPH SCARPA, Appellant.

- [1] **DIVORCE—APPOINTMENT OF RECEIVER—SALE OF PROPERTY.**—Where, in an action for divorce, the court appoints a receiver to take charge of and sell the community property, the defendant is not injured by the action of such receiver in selling two cows which he claims were neither community property nor separate property of either spouse, but belonged to a stranger to the action.
- [2] **ID.—ATTORNEY'S FEE—ALLOWANCE BY COURT.**—In such a proceeding, the court has authority to make an order for the payment of a fee to the receiver's attorney.
- [3] **ID.—ACCOUNT OF RECEIVER—ALLOWANCE—REVIEW—INSUFFICIENT RECORD.**—The appellate court cannot review the action of the trial court in allowing given items in the account of the receiver where the appellant fails to bring up the evidence concerning them.
- [4] **ID.—STATUS OF PROPERTY—DETERMINATION BY COURT—WHEN RES ADJUDICATA.**—In an action for divorce, after the court has determined that certain property is community property, and more than six months has elapsed after such determination by the interlocutory decree of divorce, the status of the property becomes *res adjudicata* and not open to further attack.
- [5] **ID.—COMMUNITY PROPERTY—JURISDICTION.**—In a proceeding in divorce, the court has jurisdiction to adjudge the character of any property claimed to be community property.
- [6] **ID.—INTERLOCUTORY DECREE—DISPOSITION OF PROPERTY—WHEN FINAL.**—An interlocutory decree of divorce becomes final as to all dispositions of property made therein after the expiration of six months from the entry thereof.

'APPEAL from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge. Affirmed.

The facts are stated in the opinion of the court.

Jos. Scarpa, *in propria persona*, and Geo. D. Collins, Jr., for Appellant.

Louis Oneal and Wm. F. James for Respondents.

KERRIGAN, J.—This is an appeal from an order settling the final account of a receiver. The proceeding springs from an action for divorce instituted by the plaintiff, Caroline L. Scarpa, against the defendant, Joseph Scarpa, in which the trial court on November 1, 1916, granted the plaintiff an interlocutory decree of divorce upon the ground of adultery, and in that decree the court directed that the homestead of the parties, together with certain belongings found to be the separate property of the plaintiff, be assigned absolutely to her, and that the community property of the parties be assigned three-fourths to the plaintiff and one-fourth to the defendant. In the decree William P. Wright was appointed receiver to take charge and make the sale of the property. He qualified and entered upon the discharge of his duties, and on October 17, 1917, he filed his report and account. Exceptions were filed thereto, and after notice and hearing the account was settled on November 5, 1917. The appeal is from this decree of settlement.

[1] Defendant objects to the action of the receiver in selling two cows, claiming that they were neither community property nor separate property of either spouse, but belonged to a stranger to the action. There is evidence in the record which sustains the finding of the court implied from its approval of the sale that these animals were legitimately the subject of the receiver's action. On the other hand, if the defendant's contention as to their ownership be correct, it is apparent that he is not injured by the action of the receiver to which he objects.

[2] Defendant also takes exception to the amount of the fee allowed to the receiver's attorney. The court, of course, had authority to make an order for the payment in question and we find nothing in the record that tends to show an abuse of the court's discretion in this respect.

[3] It appears that several of the items of the account here objected to had been the subject of a separate hearing in the course of the action, but, however that may be, the appellant as to these items has failed to bring up the evidence concerning them, which prevents this court from reviewing the action of the trial court thereon.

The remaining objections may be divided into two groups. As to one of them it must be held that the action of the court concerning the items complained of was taken upon a conflict

of evidence. As to these items, therefore, the conclusion of the trial court may not be reviewed here.

[4] The other group of objections is based upon the contention that the items of property sold were not community property. The answer to this is that the matter was determined adversely to appellant's position upon the trial of the divorce action, and, as more than six months had elapsed after such determination by the interlocutory decree before the objections to the account were filed, the status of this property was *res adjudicata*, and thus not open to further attack. [5] In a proceeding in divorce the court has jurisdiction to adjudge the character of any property claimed to be community property, and having done so in an action between these parties, the question upon the settlement of this account was no longer open. (*Huneke v. Huneke*, 12 Cal. App. 203, [107 Pac. 131]; *Allen v. Allen*, 159 Cal. 197, [113 Pac. 160].) [6] An interlocutory decree becomes final as to all dispositions of property made therein after the expiration of six months from the entry thereof, within which an appeal may be taken therefrom. (*Pereira v. Pereira*, 156 Cal. 1, [134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880, 103 Pac 488]; *Huneke v. Huneke*, *supra*; *Allen v. Allen*, *supra*.)

The order is affirmed.

Waste, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 17, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1919.

All the Justices concurred.

[Civ. No. 2614. First Appellate District, Division One.—March 19, 1919.]

FRANK J. CUNEO, Appellant, v. A. P. GIANNINI et al.,
Respondents.

- [1] **PROFITS — DETERMINATION OF MEANING.**—The terms “profits” and “net profits” depend for their meaning upon the nature of the business and properties with respect to which they are employed.
- [2] **ID.—NET PROFITS—TRADING CORPORATION.**—As applied to a trading corporation which makes its main profits in buying, selling, exchanging, and generally handling both real estate and personal properties and securities, investing, enhancing, and turning over its capital through the process of dealing in the main in property in kind, the term “net profits” means not merely the difference between the receipts and disbursements, but also the difference between the original and the increased value of its assets.
- [3] **ID.—INTERPRETATION BY PARTIES.**—The meaning to be given the term “net profits” as employed by the parties to a given contract, if the same is doubtful, must be determined in some measure at least by the interpretation which the parties themselves placed upon it during the life of the agreement in which it was used.
- [4] **CORPORATION LAW—COMPENSATION OF CORPORATION MANAGER—FIXING BY DIRECTORS — VALIDITY OF — QUALIFICATION OF DIRECTOR.**—In the absence of any showing of fraud, the action of the board of directors of a corporation in fixing the sum to which its manager is entitled, and in directing the issuance of the corporation note therefor which is subsequently paid, is not void by reason of the fact that such action is taken at a meeting attended by a bare majority of the board, one of whose members making up such majority is the wife of said manager.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge. Affirmed.

The facts are stated in the opinion of the court.

Purcell Rowe and Carl E. Day for Appellant.

Morrison, Dunne & Brobeck and Fred L. Dreher for Respondents.

RICHARDS, J.—This is an appeal from a judgment in favor of the defendants. The action was one instituted by the

plaintiff on behalf of himself as a stockholder of one of the defendants, J. Cuneo (a corporation), and on behalf of other stockholders thereof, to recover from the defendant A. P. Giannini for the corporation the sum of \$37,883.34, alleged to have been illegally paid to said defendant Giannini by the directors of said corporation.

The facts of the case are substantially uncontroverted and are briefly as follows: For many years J. Cuneo had been engaged in business in San Francisco and adjacent counties as a dealer in and trader of real estate and other kinds of property, with his offices in that city. In the year 1903 he caused to be formed the J. Cuneo Company, a family corporation, as a more convenient instrumentality for the conduct of his business and the consolidation and handling of his properties. The corporation when thus formed took over his business and continued it. Shortly after the formation of the corporation Cuneo died, leaving a widow and nine children, of whom three were minors. One of the elder daughters was at the time married to the defendant A. P. Giannini, and the latter, largely by reason of the meager business experience of the other members of the family, was intrusted with the management of the corporate affairs. A contract was entered into on October 14, 1903, between the J. Cuneo Company on the one hand and said A. P. Giannini on the other, with relation to the terms, conditions, and extent of the latter's management of the business affairs and properties of the former during a period of ten years, the portion of which contract essential to this case being that in relation to the compensation to be received by said Giannini, which reads as follows:

"That said corporation, the party of the second part, shall pay to said party of the first part for his services as said manager a sum of money in gold coin of the United States equivalent to 25% of the net profits of said corporation, an accounting by said manager to be made at the expiration of each year during the life of this agreement and payment to be made at the time of said accounting."

In pursuance of said contract said A. P. Giannini assumed and entered upon the management of said corporation and continued therein for a period of almost ten years, during which time the corporation continued to be engaged along the lines of the former business of itself and its organizer in

buying, selling, trading, and dealing in real estate, bank stocks, and other forms of property. From time to time during those years the corporation, acting through its officers, but with the knowledge and approval of the members of the family constituting its stockholders, took account of the transactions and properties of the corporation and of the increase in values of its various kinds of property, and these were carried into a loss and gain account upon the books of the corporation, which was understood to represent the profits from time to time accruing from and in its business.

In reckoning these estimated profits the properties of the corporation were dealt with in kind, and their increase in value or the increase in value of other properties for which they were exchanged, either directly or through their sale, and the investment of their proceeds in other properties, were treated as profits, and it is testified to by Mr. Giannini and other members of the family without substantial contradiction that it was the general understanding of all concerned that Mr. Giannini was, under his agreement, to be credited with twenty-five per cent of these increased valuations as shown by these occasional appraisements and loss and gain accounts, and the evidence shows that from time to time he received such credits on the books of the corporation.

In the early part of the year 1913 it was decided at a meeting of the directors of the corporation to go into virtual liquidation of its affairs and to effect a distribution of its assets among its several stockholders in proportion to their respective holdings of stock therein, such distribution to be based upon an appraisal and valuation of the properties of the corporation presently to be made. Pursuant to this understanding on January 28, 1913, at a meeting of the stockholders of the corporation, all being present, such appraisal and valuation was made and agreed to, and, so far as appears from the record, was entirely fair and satisfactory to all concerned. These appraisements and valuations showed that the values of the properties of the corporation which were thus to be liquidated and distributed had largely increased during the term of Mr. Giannini's services as manager of the affairs of the corporation, which enhanced valuations represented profits in kind though not in money. In the course of this proposed liquidation of the properties and affairs of the corporation the question of the interest and share of Mr.

Giannini under the terms of his agreement naturally arose, and it was disposed of at a meeting of the directors held on March 11, 1913, at which a majority of such directors were present, and at which the matter of Mr. Giannini's compensation under his said agreement was considered, and the amount thereof fixed at the sum of \$36,994.24 as the balance due him thereunder, and it was then further decided and directed that the note of the corporation should be executed and delivered to him for said sum in full settlement for his said services. Such note was thereupon executed and was received by him, and was subsequently paid. It is this transaction which is assailed by the plaintiff in this action, and which the trial court by its judgment herein sustained.

The main and in fact the only substantial question presented upon this appeal is that of the construction of the term "net profits" as the same appears in the clause of the agreement between the corporation and Mr. Giannini above set forth. It is the contention of the appellant that this phrase has a well-defined meaning, in which meaning it must be held to have been used by the parties to this agreement, and which meaning could not be changed or altered by oral evidence; that according to such meaning "net profits" constitute the difference between receipts and expenditures, and hence can only be represented in money; that net profits must always be actual as distinguished from estimated profits, and hence that the settlement had by the directors of this corporation with the respondent Giannini having been based upon the estimated increases in valuation of the properties of the corporation in kind, is in contravention of the agreement, and cannot therefore be upheld.

We are not prepared to give our concurrence to this contention on the part of the appellant herein. [1] The terms "profits" and "net profits" depend, in our judgment, for their meaning upon the nature of the business and properties with respect to which they are employed. The leading case upon the subject of profits in kind is the case of *In re Spanish Prospecting Company*, 1 Ch. [1911] 92, [20 Ann. Cas. 677]. The Spanish Prospecting Company had purchased from Punchard, Fleming & Vivian certain mining properties in Spain, and had engaged the services of the vendors in the management of said properties, agreeing to pay each of the members of the firm so retained a certain salary, which, how-

ever, they were not to be entitled to draw except only from the profits, if any, arising from the business of the company. In the course of said business the company acquired certain shares in another company called the Spanish Minerals Development Company, Ltd., which later went into liquidation and distributed its assets among its shareholders. By virtue of this distribution the Spanish Prospecting Company received certain shares, and also certain debentures of another corporation named the Esperanza Copper and Sulphur Company; these debentures were held in kind until such time as the Spanish Prospecting Company went into voluntary liquidation, when the question arose as to whether these were to be regarded as "profits" from which the aforesaid salaries could be paid. In an extended and luminous discussion of the subject, Lord Justice Fletcher-Moulton says: "The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context, which differ in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by the interval of a year. The fundamental meaning is the amount of gain made during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets, in calculating profits, must be valued and not merely enumerated."

The rule announced in this case has been followed by numerous later decisions on both sides of the Atlantic, notably in the case of *Stein v. Strathmore Worsted Mills Co.*, 221 Mass. 86, [108 N. E. 1029], wherein it was held by the supreme court of Massachusetts that, under a contract whereby a plaintiff became the defendant company's selling agent at an annual salary and also a percentage on net profits, the term "net profits" meant the difference between a sum made up at the end of the year of the receipts of the business and of the value of the stock, materials, machinery, real estate, and plant on hand, as compared with a sum embracing all similar items as of the beginning of the year. The following cases also recognize and apply the same rule for the estimation of the net profits of business adventures of the character of that

in which the J. Cuneo Company was chiefly engaged during the period of the plaintiff's connection with it in the capacity of its manager: *Meserve v. Andrews*, 106 Mass. 419; *Jones v. Davis*, 48 N. J. Eq. 493, [21 Atl. 1036]; *Mayer v. Nethersole*, 71 App. Div. 383, [75 N. Y. Supp. 990]. [2] The instant case, in fact, furnishes a yet stronger reason for the application of the rule than that supplied by some of the foregoing cases, since the corporation of which the plaintiff herein was manager was essentially a trading corporation, making its main profits in the buying, selling, exchanging, and generally handling both real estate and personal properties and securities, investing, enhancing, and turning over its capital through the process of dealing in the main in property in kind. When the agreement between the parties is looked to it will be seen that this fact was apparently in the minds of those who framed it, since it is therein provided that the sum which the plaintiff is to be paid for his services is "a sum of money in gold coin of the United States equivalent to 25% of the net profits of the corporation." The use of the word "equivalent" in this connection would seem to quite clearly indicate that the net profits of the corporation were not to be altogether comprehended in terms of a money residue as a result of the business of the year.

[3] In addition to these considerations we are of the opinion that the meaning to be given the term "net profits" as employed by the parties to this contract, if the same be doubtful, must be determined in some measure at least by the interpretation which the parties themselves placed upon it during the nearly ten years of the conduct of the business of the corporation by the plaintiff under this contract. The evidence, we think, shows clearly that upon several occasions, and particularly with respect to certain specific properties, the amount to which the plaintiff was entitled and which he actually received was determined by a comparison of the values of the assets of the corporation in kind at different periods of time. These valuations and the assignment to the plaintiff of his one-fourth interest in the said assets and properties, based thereon, were, we think, made fairly and openly, and with the knowledge and acquiescence of the various members of the Cuneo family interested therein, and this being so, we think it sufficiently appears that the parties themselves have placed upon this agreement the very inter-

pretation in practical effect which the foregoing authorities would indicate to be the proper one as a matter of law.

[4] The further contention of the appellant to the effect that the action of the directors of the corporation in fixing the sum to which the respondent Giannini was entitled, and in directing the issuance of the corporation note therefor which was subsequently paid, must be held void, for the reason that such action was taken at a meeting attended by a bare majority of the said board, one of whose members making up such majority was the wife of said respondent, we think to be possessed of no merit. The said meeting was regularly called and held, so far as the record discloses. The wife of Mr. Giannini was also one of the shareholders in this family corporation, whose interests as such would be adversely affected by the action of the board in the allowance of his claim. She was not directly or beneficially interested, in a financial sense, in the result of the action of said board in the allowance of said claim. The mere fact that the claimant was her husband, and that the amount of his claim if allowed and paid would work an accretion of the community funds of the spouses, would not, in our opinion, create such an interest in the wife as would disqualify her from acting as a member of the board of directors of the corporation. None of the cases cited by the appellant goes so far, and we are satisfied that to uphold the view of the appellant in this regard, in the absence of any showing of fraud, would be to create an altogether too narrow limitation upon the powers of boards of directors or trustees of family corporations in which very frequently like dual relations and interests exist. In the instant case there is no showing of any kind tending in the slightest degree to disclose any sort of misleading, or overreaching, or concealment, or advantage, or fraud of any kind on the part of the respondent in respect to any of the transactions in the course of his management of the properties and affairs of the family corporation, and the fact that this action was begun and has been prosecuted by a minority stockholder after a refusal on the part of the directors to reconsider their action, or to themselves institute the same, would serve to indicate that the majority of the stockholders do not wish the action of the directors in the premises overturned.

The foregoing being our view of the law and the facts of this case, it follows that the judgment herein should be affirmed. It is so ordered.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 15, 1919.

All the Justices concurred.

[Civ. No. 2835. First Appellate District, Division One.—March 20, 1919.]

RANSOME-CRUMMEY COMPANY, Appellant, v. LOUIS E. WOOD, Respondent.

[1] SUMMONS—SERVICE—RETURN—JURISDICTION—DISMISSAL OF ACTION.

The failure of the plaintiff, in an action to foreclose a street assessment lien for work done pursuant to the provisions of the Vrooman Act, to cause the summons, with proof of service thereof, to be returned within three years after the commencement of the action, deprives the court of jurisdiction to take any other action than to dismiss the case.

[2] ID.—DISMISSAL BY COURT—NOTICE.—Where the plaintiff has failed to return the summons with proof of service thereof, within three years after the commencement of the action, the court can dismiss the case without notice to either of the parties.

[3] COURTS—TRANSFER AND ASSIGNMENT OF CASES.—The judges of the superior court in a particular county, for the more convenient dispatch of business or for any reason they may deem necessary, may assign or transfer cases for trial to any one or more of the several departments of such court. Notice of such transfer is not required by the statute.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. A. Beasley, Judge. Affirmed.

The facts are stated in the opinion of the court.

R. M. F. Soto for Appellant.

Fry & Jenkins for Respondent.

WASTE, P. J.—Plaintiff appeals from an order dismissing the action.

On the tenth day of June, 1914, plaintiff commenced an action against defendant by filing in the superior court of Santa Clara County its verified complaint to foreclose a certain street assessment lien. Summons was duly issued on the same day. No further proceedings were had in the cause until on June 8, 1917, when an amended complaint was filed. Thereafter, on the twenty-sixth day of June, 1917, the summons was filed in the action, together with an affidavit showing service thereof upon the defendant, Louis E. Wood, "on the — day of June, 1917."

On the same day, June 26th, there was filed on behalf of said defendant, Louis E. Wood, a notice of motion for an order dismissing the cause upon the ground that the summons in the action was not served or return thereon made within three years after the commencement thereof. The motion was noticed to be heard on the twenty-ninth day of June, at 10 A. M. of said day, or as soon as counsel could be heard (three days after its filing), and time of notice was shortened to one day by order of the judge of the court. On the same day the motion was filed, June 26th, the notice of motion and order shortening time were served on the attorney for plaintiff by deposit in the postoffice in San Jose, the office of plaintiff's attorney being in San Francisco.

The motion to dismiss was based on the affidavit of the defendant and the records in the case. According to the former, the defendant was not served with the summons until on the twenty-fifth day of June, 1917, and at no other time was any pleading or paper in the action ever served on him.

On the day, and at the time noticed, June 29th, the motion was regularly on the calendar of Department One of the superior court of Santa Clara County, and was transferred to Department Three of said court, where, after due hearing, the court granted the motion and dismissed the action upon the grounds specified in the notice. Notice of the court's action was given to plaintiff by mail. It took no steps to have the order dismissing the action set aside, but contents itself with an appeal therefrom.

On the appeal, it is contended that due notice of the motion to dismiss the action was not given appellant (plaintiff)

in the court below; that the place where the motion was heard (Department Three of the said superior court) was not the place specified in the notice of motion, and that the time within which a summons must be returned in street assessment lien cases is governed by the provisions of the Vrooman Act (Stats. 1885, p. 147), which is incorporated as part and parcel of the freeholders' charter of the city of San Jose, and not by the provisions of the general law.

We see nothing of merit in any of the points made. [1] The failure of the plaintiff to cause the summons, with proof of service thereof, to be returned within three years after the commencement of the action, deprived the court of jurisdiction to take any other action than to dismiss the case. (Sec. 581a, Code Civ. Proc.; *Sharpstein v. Eells*, 132 Cal. 507, [64 Pac. 1080]; *Modoc Land etc. Co. v. Superior Court*, 128 Cal. 255, [60 Pac. 848]; *Davis v. Hart*, 123 Cal. 384, [55 Pac. 1060]; *Bellingham Bay Lumber Co. v. Western Amusement Co.*, 35 Cal. App. 517-519, [170 Pac. 632].) Such action "must be dismissed by the court . . . on its own motion." (Sec. 581a, *supra*.) [2] The court can take such action without notice to either of the parties. On the record plaintiff was not entitled to notice.

[3] There is no merit in appellant's point as to the transfer of the case from one department of the trial court to another. The judges of the superior court in a particular county, for the more convenient dispatch of business or for any reason they may deem necessary, may make, assign or transfer cases for trial to any one or more of the several departments of such court. (*Bell v. Peck*, 104 Cal. 38, [37 Pac. 766].) Appellant refers to no rule of court providing for any notice of such transfer, and none is required by the statute. (*Bell v. Peck*, *supra*; *Dusy v. Prudom*, 95 Cal. 646, [30 Pac. 798]; *Eltzroth v. Ryan*, 91 Cal. 587, [27 Pac. 932].)

Appellant fails to point out wherein the Vrooman Act conflicts with or creates any procedure governing the service of summons or the disposition of suits thereunder different from that provided by the codes of the state. The act itself provides to the contrary. The right to institute suit to recover any assessment remaining unpaid, and to have a lien therefor adjudged against the premises assessed and the land sold thereunder, is given by section 12 of that act. It provides, in part: "Suit may be brought in the superior court within

whose jurisdiction the city is in which said work has been done, and in case any of the assessments are made against lots, portions of lots, or lands the owners of which cannot, with due diligence, be found, the service of summons in each of such actions may be had in such manner as is prescribed in the codes and laws of this state . . . In all suits now pending, or hereafter brought to recover street assessments, the proceedings therein shall be governed and regulated by the provisions of this act, and also, when not in conflict herewith, by the codes of this state." (Stats. 1913, pp. 408, 409.)

The order appealed from is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 17, 1919.

[Crim. No. 700. First Appellate District, Division One.—March 21, 1919.]

THE PEOPLE, Respondent, v. PEDRO A. BERNAL, Appellant.

- [1] **CRIMINAL LAW—CONFLICT OF EVIDENCE—REVIEW.**—In this prosecution for a violation of section 288 of the Penal Code, the defendant having denied the commission of the act as testified to by the prosecuting witness, whose testimony was corroborated by her mother and two other witnesses, it was for the jury to pass upon the conflict of testimony, and it having done so, the appellate court may not review the evidence in this regard.
- [2] **ID.—INSTRUCTION — CREDIBILITY OF WITNESS — WEIGHT OF TESTIMONY.**—In such prosecution, the court properly instructed the jury that, "In determining as to the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance and manner of the witness while on the stand; the interest of the witness, if any, in the result of the trial; the motives which actuate the witness in testifying, or in giving contradictory or false testimony, the witness' relation or feeling toward the defendant and the probability or improbability of the witness' statement being true when consid-

- ered with reference to all other evidence, facts, and circumstances proved in the case."
- [3] **ID.—TESTIMONY OF DEFENDANT.**—In such prosecution, it was not error to instruct the jury that, "The defendant in this case has offered himself as a witness in his own behalf, and you are to judge his evidence by the same rules that you would that of any other witness. You have no right to disregard his testimony merely upon the ground that he is the defendant and stands charged with this crime; but you should fairly and impartially judge his testimony together with all other evidence in the case."
- [4] **ID.—INTEREST OF WITNESS.**—No error was committed by the court in instructing the jury that, "In judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case."
- [5] **ID.—ABSENCE OF MOTIVE—INTENT.**—The giving of an instruction to the effect that if the evidence in the case failed to show a motive on the part of the defendant for committing the crime charged in the information, that that was a circumstance which the jury must consider in connection with all the other evidence in arriving at its verdict, and that the absence of motive on the part of the defendant was a strong factor in favor of his innocence, followed by an instruction giving the definition of "intent" as laid down in section 21 of the Penal Code, was not error because of the use of the word "motive."
- [6] **ID.—CONCERN OF JURY AS TO FINAL JUDGMENT—ARGUMENTATIVE INSTRUCTION.**—An instruction prefaced with the words "in view of the arguments in this case" and in which the court proceeded to tell the jury, in substance, that it was not concerned with what might be the final judgment, or sentence, of the court in the event they should find the defendant guilty, and that the jury must put out of consideration entirely what the court might or might not do in the case, was not argumentative.
- [7] **ID.—REQUESTED INSTRUCTIONS—REPETITION.**—The court properly declined to give the jury certain instructions proposed by the defendant, which were only repetition of other instructions given.
- [8] **ID.—MISCONDUCT—WAIVER OF OBJECTION.**—Where no assignment of misconduct, or request for an admonition to the jury to disregard objectionable remarks, is made at the time of the trial, the objection will, on appeal, be deemed to have been waived.

APPEAL from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge. Affirmed.

The facts are stated in the opinion of the court.

Frank A. Henning for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

WASTE, P. J.—Defendant was charged by an information with the violation of section 288 of the Penal Code. He was convicted and sentenced to imprisonment in the state prison for the term of one year. He now appeals from such judgment and from the order denying his motion for a new trial.

Appellant complains that the evidence is insufficient to support the verdict. The prosecuting witness, a girl upon whose person the lewd and lascivious acts were committed, was about eleven years old at the time of the trial. She testified in detail to the acts of the defendant constituting the crime. Her testimony was corroborated by the testimony of her mother and two other witnesses, to the effect that shortly after the acts complained of defendant was brought before the little girl, who told what had happened. The defendant was thereupon asked if the little girl was telling the truth and he answered: "Yes." He further stated to these three witnesses: "I was tempted, a funny feeling came over me. I don't know why I did it." Later the defendant stated to the district attorney, when questioned about the matter: "Well, I didn't harm her. I looked at her and saw that she was young and I stopped just in time. I guess because I was passionate."

[1] The defendant introduced no testimony other than his own concerning the occurrence. He positively denied the commission of the offense. There was, therefore, presented only a conflict of testimony which it was the duty of the jury to pass upon, and it having done so, this court cannot review the evidence in this regard.

Defendant complains that the court erred in giving the jury the following instructions: [2] "In determining as to the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance and manner of the witness while on the stand; the interest of the witness, if any, in the result of the trial; the motives which actuate the witness in testifying, or in giving contradictory or false testimony, the witness' relation or feeling toward the defendant and the probability or improbability of the witness' state-

ment being true when considered with reference to all other evidence, facts and circumstances proved in the case." The instruction was proper. (*People v. Wong Ah Foo*, 69 Cal. 183, [10 Pac. 375]; *People v. Dolan*, 96 Cal. 315, [31 Pac. 107].) By the instruction the court simply informed the jury of certain facts and circumstances in the case before them, which they would perhaps, as men of ordinary observation, have been bound to know. (*People v. Bush*, 71 Cal. 602, [12 Pac. 781].)

[3] The court instructed the jury as to defendant's testimony as follows: "The defendant in this case has offered himself as a witness in his own behalf, and you are to judge his evidence by the same rules that you would that of any other witness. You have no right to disregard his testimony merely upon the ground that he is the defendant and stands charged with this crime; but you should fairly and impartially judge his testimony together with all other evidence in the case." The court did not err in giving the instruction. It did not go as far as did the court in instructions which have been upheld. (*People v. Cronin*, 34 Cal. 191; *People v. Lang*, 104 Cal. 363, [37 Pac. 1031]; *People v. Wells*, 145 Cal. 138, [78 Pac. 470].)

[4] The court instructed the jury that: "In judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case." No error was committed by the court in this regard. (*People v. Bush*, *supra*; *People v. Amaya*, 134 Cal. 531, [66 Pac. 794].)

[5] The court instructed the jury that if the evidence in the case failed to show a motive on the part of the defendant for committing the crime charged in the information, that that was a circumstance which the jury must consider in connection with all the other evidence in arriving at its verdict, and that the absence of motive on the part of the defendant was a strong factor in favor of his innocence, and in that connection gave the following instruction: "Now, gentlemen, upon this question of intent and motive, I will read you the definition as laid down in the Penal Code in section 21: 'The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither

idiots or lunatics, nor affected with insanity.' " This was not error, and appellant's attempt to draw a distinction between the use of the word "motive" in the instructions and the use of the word "intent" in the code section does not impress us as worthy of further consideration.

[6] The court prefaced one instruction with the words "in view of the arguments in this case," and proceeded to tell the jury, in substance, that it was not concerned with what might be the final judgment, or sentence, of the court in the event they should find the defendant guilty, and that the jury must put out of consideration entirely what the court might or might not do in the case. Appellant contends that this instruction was argumentative. There is nothing in the point. The giving of other instructions is complained of, but our examination satisfies us that the court committed no error in its charge.

[7] The court declined to give the jury certain instructions proposed by the defendant: As to presumption of innocence; the difference between civil and criminal causes in respect to the degree or quality of the evidence necessary to justify a jury in finding for the plaintiff; and relative to the good character of the defendant. The court, however, fully and correctly covered each of these points in its charge. The rejected instructions were only repetition. The court is not bound to state the law to the jury more than once. (*People v. Hong Ah Duck*, 61 Cal. 387; *People v. Feld*, 149 Cal. 464, [86 Pac. 1100].)

The defendant while on the stand denied the commission of the offense and contradicted the testimony of the witnesses for the prosecution. He devoted the greater part of his testimony to the attempt to establish what he termed a "frame-up" on the part of the family of the prosecuting witness, and the officials of Santa Clara County. He related a most remarkable story of alleged brutal treatment at the hands of the authorities when first placed in the county jail. The effect of the testimony, if true, and believed by the jury, would tend to prejudice the prosecution, and put in question the mental soundness of the defendant. It was apparently given for that purpose. At the conclusion of defendant's testimony, the following occurred in open court, in the presence of the jury:

"By the Court: Mr. Thomas, I would like to call some deputy sheriff, or whoever has charge of these men, and investigate this particular charge that he is making here; to test the man's knowledge of things, to put it mildly. Who had charge of this man, Mr. Buffington?"

"By Mr. Buffington: Billy Rowland.

"By the Court: Where is Rowland—is he here?"

"By Mr. Buffington: Yes.

"By the Court: Bring Rowland in; you may step down, Mr. Bernal.

"By Mr. Free: He is entirely crazy, or making believe.

"By the Court: That is what I want to find out."

Mr. Free, who took part in this colloquy, was the district attorney of the county and had testified as a witness for the prosecution. He apparently took some part in the conduct of the case. Witnesses were called to testify as to what really took place in the jail, the effect of which was to entirely discredit the defendant's story. Appellant contends that the remarks of the court and the district attorney tended to prejudice the defendant in the minds of the jury and constituted a reversible error. Appellate courts are continually warning trial courts, and prosecuting officers, of the danger of giving utterance to any statements tending, or in any wise so conducting themselves as, to cause prejudice against defendants in the minds of jurors. But bearing in mind that defendant had undoubtedly sought to influence the jury by his own testimony, to which we have referred, we cannot feel that prejudicial error was committed by either the court, or the district attorney, in the manner so complained of. [8] Furthermore, no assignment of misconduct or request for an admonition to the jury to disregard the objectionable remarks was made at the time of the trial, in which state of the record the objection will be deemed to have been waived on appeal. (*People v. Shears*, 133 Cal. 154, [65 Pac. 295]; *People v. Amer*, 8 Cal. App. 143, [96 Pac. 401]; *People v. Ye Foo*, 4 Cal. App. 743, [89 Pac. 450].)

Certain rulings of the court on the admission of testimony are complained of, but our examination of the record satisfies us that no prejudicial error was committed.

The judgment and order are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on May 19, 1919.

All the Justices concurred, except Lawlor, J., who was absent.

[Civ. No. 2736. First Appellate District, Division Two.—March 21, 1919.]

H. L. NAY, Appellant, v. J. BERNARD et al., Respondents.

- [1] FINDINGS — CONFLICTING EVIDENCE — REVIEW.—Findings based on conflicting evidence cannot be disturbed on appeal.
- [2] EASEMENTS—ADVERSE USER—PERMISSIVE USE.—A right of way by adverse user or prescription cannot be based upon a permissive use of the road.
- [3] ID.—RESERVATION IN GRANT — APPURTENANT TO DOMINANT TENEMENT—PAROL EVIDENCE.—An easement conveyed by an express grant may be shown to be appurtenant to a dominant tenement by reason of facts appearing *aliunde* the deed, notwithstanding a description of such dominant tenement is not contained in the grant.
- [4] ID.—DIVISION OF LANDS—QUASI EASEMENTS.—Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains.
- [5] ID.—IMPLIED RIGHTS OF WAY—KNOWLEDGE OF PARTIES.—In this state, the doctrine of implied right of way is not limited to cases of rights of way by necessity, but applies whenever the *quasi* easement is obviously apparent or the parties had knowledge of its existence.
- [6] ID.—RESERVATION OF QUASI EASEMENT—EFFECT OF OTHER RESERVATIONS.—A *quasi* easement reserved to the grantor upon the severance of his estate will not be affected by an express reservation of another right of way for another purpose, especially when the latter reservation is a right of way for future use.
- [7] ID.—CONSTRUCTION OF EASEMENT — SUBSEQUENT CONVEYANCE — REFERENCE TO IN DEED.—In this action to establish a right of way, the easements involved were appurtenant to the land retained by the common predecessor of the parties at the time of his severance of the tract over which the right of way was reserved and passed by

the subsequent conveyance of the land originally retained without particular reference thereto in the deed.

- [8] **ID.—SUIT TO ESTABLISH—DIRECTED JUDGMENT BY APPELLATE COURT.**
On appeal from a judgment in favor of the defendant in an action to establish such right of way, although the conclusions of the appellate court may be in favor of the appellant's title, it cannot direct the entry of a judgment in his favor in the absence of findings as to the existence and use of the road prior to the execution of the deed to the servient tenement.

APPEAL from a judgment of the Superior Court of Sonoma County. Thomas C. Denny, Judge. Reversed.

The facts are stated in the opinion of the court.

W. F. Cowan for Appellant.

Juilliard & Harford for Respondents.

HAVEN, J.—Plaintiff appeals from a judgment in favor of defendants in an action to establish a right of way, to restrain defendants from interfering therewith and to recover damages for prior interference. In 1894 the adjoining ranch properties of plaintiff and defendants were owned by Calvin H. Holmes and held by him as a single tract of land. In September of that year he divided this tract by conveying to his son-in-law, Charles H. Foote, the southerly portion thereof, which is now owned by defendants and is hereinafter referred to as the "Bernard property," retaining title at that time in himself to the northerly portion of the tract, which is now owned by plaintiff and is herein referred to as the "Nay property." The plaintiff acquired title to the Nay property in 1906 by mesne conveyances from Calvin H. Holmes. The title to the Bernard property was conveyed by Charles H. Foote to the defendant John Bernard by deed dated March 12, 1913. The deed of the Bernard property from Holmes to Foote contained the following *habendum* clause:

"To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever, excepting the privilege of conducting water through a six-inch pipe at any point on the premises from said Yellow Jacket Creek. The right hereby is reserved to my heirs and assignees forever of six inches of water therein with the right-of-way to con-

duct said water and the right-of-way to travel over said land by a road to be laid out or kept open for travel."

A road from the Nay property across the Bernard property to the county road had existed for a number of years prior to the division of the tract by the execution of the above-mentioned deed. The evidence is conflicting as to the extent and nature of the use of such road prior to the date of the deed, but the grantee testified that it was a traveled road at that time, and its use to some extent and the recognition of its existence were clearly established.

Appellant claims that the evidence established: First, that the easement of the right of way for a road was appurtenant to the Nay property; second, that a right of way by necessity existed; third, that plaintiff had acquired an easement by adverse user and prescription; fourth, "that defendants were estopped from disputing the rights of plaintiff." Upon the question of a right of way by adverse user and prescription, the trial court found that the plaintiff had never traveled any portion of the road adversely to defendants nor under any claim of right, "but whenever plaintiff has traveled said road it has always been with the permission of the owners of the land over which said way runs"; and further, "that the portion of said road crossing the lands of defendants and the gates thereon were never used by others than the owners of said land except by and with the permission of such owners." These findings are supported by evidence offered on behalf of the defendants. [1] The evidence of plaintiff is in conflict therewith; but, under that state of the record, the findings cannot be disturbed. [2] A right of way by adverse user or prescription cannot be based upon this permissive use of the road.

The claim of a right of way by necessity was waived by the attorney for the appellant on the argument; and necessarily so, as the evidence discloses that the Nay land itself borders on a county road to which appellant has constructed a road over his own land.

The question chiefly argued in the briefs is whether the easement of a right of way for a road was appurtenant to the Nay property or was an easement in gross, personal to Calvin H. Holmes, the grantor in the above referred to deed. If appurtenant, it passed to plaintiff as an incident to the land conveyed to him. If personal to Holmes, plaintiff proved no

title thereto, as no conveyance of the easement as such was offered in evidence. The trial court found the execution of the deed with its *habendum* clause as above set forth. To such finding the following is added:

"That in said deed there is no mention or description of the lands hereinbefore described, and found to now belong to plaintiff or any portion of said lands, nor does said deed mention or describe any other lands or property than said 538.55 acre tract therein conveyed to said C. H. Foote. That neither said road nor right of way nor any portion thereof over said lands of defendants is now or ever has been appurtenant to the lands now owned by plaintiff or any portion thereof. That at the time of the conveyance of said 538.55 acre tract from Calvin H. Holmes to Charles H. Foote, said Calvin H. Holmes owned the whole of the present Nay ranch described in plaintiff's complaint, and thereafter continued to own said ranch for several years. That said Ranch was thereafter, after several successive transfers, conveyed to plaintiff; that none of the deeds or conveyances in the line from said Calvin H. Holmes to plaintiff in any way mention or refer to said right of way."

It is evident that the conclusion of the trial court that the easement was not appurtenant to the Nay property is based upon the finding that said property is not described nor referred to in the deed by which the Bernard property was conveyed. Such conclusion is warranted by the case of *Wagner v. Hanna*, 38 Cal. 111, [99 Am. Dec. 354], if the rule of that case is still the law of this state. The principle there announced is that, upon severance of an entire tract of land by conveyance of a portion thereof, an easement reserved by the grantor, for the benefit of the portion of the tract retained, is not appurtenant thereto unless the latter tract is described in the deed. We are of the opinion, however, that, while this case has not been expressly overruled, later decisions of the supreme court are so inconsistent therewith as to destroy its authority upon the particular point here involved.

In *Hopper v. Barnes*, 113 Cal. 636, [45 Pac. 874], the plaintiff and defendant owned adjoining quarter-sections of land. Defendant granted to plaintiff a right of way for a road over defendant's land. The deed contained an exact description of the granted right of way by metes and bounds, but did not describe either the land of plaintiff in connection

with which the right of way was to be used or the remaining land of defendant from which the right of way was carved. The exact question considered by the court was whether, under such circumstances, the easement was personal to the grantee or appurtenant to his adjoining land. After citation of authority to the effect that an easement is never presumed to be in gross when it can fairly be construed to be appurtenant to some other estate, the court held that the right of way there involved should be considered as appurtenant to plaintiff's land. In reaching that conclusion the court quotes with approval from a Massachusetts case (*Dennis v. Wilson*, 107 Mass. 591) as follows: "Where there is in the deed no declaration of the intention of the parties in regard to the nature of the way, it will be determined by its relation to other estates of the grantor, or its want of such relations."

This is a distinct holding that the nature of the easement, whether personal or appurtenant, may be determined by evidence *aliunde* the deed; which is the very thing that the case of *Wagner v. Hanna*, *supra*, holds cannot be done.

[3] The principle established by *Hopper v. Barnes*, *supra*, has been applied in a number of later cases, in all of which an easement conveyed by an express grant was held to have been appurtenant to a dominant tenement by reason of facts appearing *aliunde* the deed, and notwithstanding that no description of such dominant tenement was contained in the grant. (*Jones v. Sanders*, 138 Cal. 405, [71 Pac. 506]; *Jones v. Deardorff*, 4 Cal. App. 18, [87 Pac. 213]; *Gardner v. San Gabriel Valley Bank*, 7 Cal. App. 106, [93 Pac. 900].)

The case of *Wagner v. Hanna* is not referred to in any of the later cases, but we cannot escape the conclusion that it is practically overruled thereby.

[4] If the deed from Holmes to Foote had contained no reservation whatever of a right of way for a road, a quasi easement for that purpose would have been created in favor of, and as an appurtenance to the land retained by the grantor, which is now the Nay property. In *Cave v. Crafts*, 53 Cal. 135, 139, the court adopts the rule laid down in a leading New York case (*Lampman v. Milks*, 21 N. Y. 505) as follows: "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all

the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. . . . No easement exists so long as the unity of possession remains, because the owner of the whole may at any time rearrange the quality of the several servitudes; but upon severance by the sale of a part, the right of the owner to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale."

This rule is repeated in the same language in *Quinlan v. Noble*, 75 Cal. 250, 252, [17 Pac. 69], and is applied in the recent cases of *Cheda v. Bodkin*, 173 Cal. 16, [158 Pac. 1025], and *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 412, [129 Pac. 593].

[5] Under the common law and many authorities in other jurisdictions, the doctrine of an implied right of way is limited to cases of rights of way by necessity. In this state, however, the rule is applied whenever the *quasi* easement is obviously apparent or the parties had knowledge of its existence at the time of the grant. (Civ. Code, sec. 1104; *Jones v. Sanders*, *supra*.) The record in this case discloses that the road here involved had existed and been used for a number of years prior to the deed from Holmes to Foote, and it is apparent that both parties had knowledge of its existence and use at the time of the execution of that deed.

[6] Respondent claims that all of the clauses found in the *habendum* in the deed from Holmes to Foote should be construed as having reference to the privilege of conducting water, and that the right of way "to travel over said land by a road to be laid out or kept open for travel" has reference to such a right of way for the purpose of visitation and repair of water pipes alone; in other words, that the only right of way reserved by this clause in the deed is not for a road for general travel, but solely for the purpose of being used as an incident to the privilege of conducting water, referred to in other portions of the *habendum* clause. If this construction is correct, manifestly the deed had no effect upon the *quasi* easement which is based upon the act of Holmes in conveying a portion of his land over which an established road for travel existed. Such easement reserved to the grantor upon the severance of his estate would not be affected by an express reservation of another right of way for another purpose, es-

pecially when the latter reservation was for a right of way for future use. If, on the other hand, the clause referred to is to be construed as an attempted reservation by the grantor of a right of way for a road in existence or another one to be laid out for general travel, we are of the opinion that the intent of the grantor to reserve such easement for the benefit of and as appurtenant to the portion of the land which he did not convey sufficiently appears from the record before us.

[7] The conclusions which we have reached are strengthened by the provisions of section 1069 of the Civil Code, to the effect that, in case of a reservation in a deed, the construction most favorable to the grantor must be placed upon the language of such reservation. We hold, therefore, that the easement here involved was appurtenant to the land retained by Holmes at the time of the execution of his deed and passed by the subsequent conveyances of that land to the plaintiff. Such an easement passes by transfer of the land itself without particular reference thereto. (Civ. Code, sec. 1084; *Cave v. Crafts*, 53 Cal. 140.)

[8] Notwithstanding our conclusions in favor of appellant's title to the right of way in dispute, a judgment in his favor cannot be directed, unless the findings of the trial court will support such judgment. We have no power to modify the findings as made. The only finding as to existence of the road here involved is that it has been in existence "for more than five years last past." For support of a judgment in favor of appellant, under the views hereinabove expressed, findings are necessary as to the existence and use of the road prior to the execution of the deed from Holmes to Foote in 1894. In the absence of such findings, we cannot direct the entry of a judgment.

The judgment appealed from is reversed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2630. Second Appellate District, Division One.—March 21, 1919.]

WILLIAM J. O'NEIL, Respondent, v. A. W. BRODE, Appellant.

- [1] **MUNICIPAL CORPORATIONS — PARKS AND PLAYGROUNDS — ACQUIRING OF LANDS — SALE OF PROPERTY FOR DELINQUENT ASSESSMENTS.**—Under the act of the legislature approved April, 1909 (Stats. 1909, p. 1066), authorizing the acquiring of land by municipalities for purposes of public parks or public playgrounds, the establishment of assessment districts and the assessment of the property therein to pay the expense of acquiring such land, it is the fact of the delinquency of a given assessment, rather than the attachment of a certificate as to that fact, which establishes the jurisdiction of the board of public works to proceed with the sale of the property.
- [2] **ID.—CERTIFICATE OF SALE — EXECUTION — FACSIMILE STAMP SIGNATURE.**—The requirement of such act that, after making sale of property for delinquent assessment, the street superintendent must execute in duplicate a certificate of sale, one copy of which is to be filed in the superintendent's office and the other delivered to the purchaser, is sufficiently complied with by the signing of one certificate by the president of the board of public works (such board acting in the stead of the street superintendent), which is delivered to the purchaser, and the signing of the other by a *facsimile* stamp signature of the same officer, which is impressed by the assessment clerk at the direction of such officer.
- [3] **ID.—EXECUTION OF DEED BY PRESIDENT OF BOARD.**—The board of public works has power to direct its president to make all deeds of property sold for delinquent assessments, as the act to be done is one which involves no discretion on the part of the board.
- [4] **ID.—AUTHORITY OF PRESIDENT—DATE OF RESOLUTION IMMATERIAL.** The fact that the resolution of the board of public works directing the president thereof to execute such deeds was adopted before the passage of the act under which the assessment was levied and sale had does not affect his authority to execute such deed.
- [5] **ID.—NOTICE TO REDEEM—RECITAL OF UNAUTHORIZED ITEM—EFFECT.** Where the notice to redeem, as given by the purchaser, sufficiently refers to the improvement for which the property was sold and states the amount required to be paid to effect redemption, the fact that it also contains a statement that there will be added "\$3.00 for the service of this notice and making affidavit thereto, as allowed by law," even though such charge is unauthorized, does not invalidate the notice.

[6] **ID.—SERVICE OR NOTICE—SUFFICIENCY OF AFFIDAVIT.**—The affidavit of service of the notice to redeem is not faulty in failing to state the name of the person upon whom service was made, it stating that on a given date the purchaser did "serve upon the owner and occupant of said property a notice," etc.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. **Reversed.**

The facts are stated in the opinion of the court.

George H. Moore for Appellant.

Conner, Heath & Maxwell for Respondent.

JAMES, J.—Plaintiff had judgment quieting his title to a certain parcel of land located in the city of Los Angeles, from which judgment defendant has appealed. Defendant's claim of title to the land in question was based upon a deed issued by the board of public works of the city of Los Angeles, which deed had for its foundation a sale for delinquent assessment made under the authority of an act of the legislature approved April, 1909. (Stats. 1909, p. 1066.) This act authorized the acquiring of property by municipalities for purposes of public parks or public playgrounds. The trial court held with the plaintiff that there were such irregularities in the procedure adopted by the assessment officers and in the notice to redeem as given by the defendant, as to invalidate the deed. It is admitted by the plaintiff that all the proceedings taken up to the time when assessments became delinquent were regular.

[1] 1. The first asserted defect consists in the failure of the board of public works to make a certificate upon the assessment-roll of the fact that the assessments had become delinquent. A certificate was in fact made, but was signed "Board of Public Works, by R. I. Follmer, Assistant Clerk." Of course, it must be conceded that there was no authority in a clerk to execute the certificate on behalf of the board, so that the real question presented is as to whether the failure of the board to make such a certificate was vital to the proceedings which followed. Section 18 of the act referred to, as relating to the making of assessments, after declaring that notice shall be given by publication of the fact that the assess-

ment has been recorded in the office of the street superintendent (the board of public works acting in the stead of such an official under the charter of the city of Los Angeles), and that the sums assessed are due and payable within thirty days from the date of the first publication of the notice, provides that "on the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment-roll, and mark each such assessment 'Delinquent,' and add five per cent to the amount of each delinquent assessment." The section immediately following provides that within ten days "from the date of such delinquency" the street superintendent shall begin the publication of a list of delinquent assessments, which shall contain a description of each parcel of the property delinquent, the name of the owner as stated in the assessment-roll, and the amount of the assessment, penalty, and costs due, including the cost of advertising, and shall append a notice that unless each delinquent assessment is paid, the property upon which such assessment is a lien will be sold at public auction at a time stated in the notice. It will be noted that the act declares that the unpaid assessments, upon the expiration of thirty days from the date of publication of the notice first referred to, shall become delinquent, and that the street superintendent shall, within ten days from the date of delinquency, begin the publication of a list of the delinquent assessments. The assessments under the express terms of the act are delinquent before the certificate is required to be made at the foot of the assessment-roll. The subsequent notice to be published by which the owners are to be informed that unless the delinquent assessments, together with penalties and costs, are paid, their property will be sold, is not required to contain the certificate so attached to the roll, and it does not appear that the making of such certificate is at all a prerequisite jurisdictional matter which must occur before the last notice to the property owner is published. It is not contended that there was a failure of the board to mark the overdue assessments "delinquent" as required by the act; hence, upon the roll itself there would be indicated which of the assessments had not been paid and were subject to the delinquency penalty. We think it was the fact of delinquency, rather than the attaching of a certificate as to that fact, which established the jurisdiction of the board

to proceed with the sale of the property. Direct authorities bearing upon this question are not many, but the reasoning of the supreme court in *Bienfeld v. Van Ness*, 176 Cal. 585, at page 591, [169 Pac. 225], we think is applicable here.

[2] 2. The act further required that after making sale of property for delinquent assessment the street superintendent must execute in duplicate a certificate of sale, one copy of which is to be filed in the superintendent's office and the other delivered to the purchaser. The certificate of sale was made in duplicate, except that one copy was signed by the president of the board of public works by his own hand and the other was signed by a *facsimile* stamp signature of the same officer, which was impressed upon the document by the assessment clerk. This clerk, however, testified that he stamped the signature on the duplicate at the direction of the president of the board; that the original was delivered to the purchaser and the one signed by the rubber stamp retained in the files of the office. We think that the duplicate was sufficiently signed by the president of the board and that for the purpose he adopted the rubber stamp as expressing his signature. That he had power to direct the attaching of the stamp by the clerk and that the signature in law would become his own act, we have no doubt. (*Williams v. McDonald*, 58 Cal. 527; *Pennington v. Baehr*, 48 Cal. 565; *Jansen v. McCahill*, 22 Cal. 563, [83 Am. Dec. 84].)

[3] 3. The deed issued to defendant as purchaser at the sale was signed by the president of the board of public works. It is claimed that its execution in that manner was unauthorized, because the charter of the city of Los Angeles provides that "all documents required to be signed or executed by the board of public works, shall be signed on order of the board by the president or by two members thereof." Prior to the time when the proceedings were instituted and prior to the adoption of the act under which the same were taken, the board of public works had adopted a general resolution directing, among other things, "that the president of the board of public works, or, in the absence of the president, two members thereof, be and they hereby are authorized and directed in the name of and on behalf of said board, to sign and execute all certificates of sale and all deeds of property sold for delinquent assessments for the opening and widening of streets, alleys, and other public places." It was under

authority of this resolution that the president of the board made the deed which was delivered to the appellant. We think that the board had power to direct its president to make all deeds of the nature indicated in the resolution, as the act to be done was one which involved no discretion on the part of the board—was purely a ministerial function which could not be avoided. [4] Nor do we think that the fact that this resolution was adopted before the act of the legislature under which the proceedings were taken makes any difference. The authorization and direction given by the resolution applied to all proceedings and such acts connected therewith as might then or in the future be required to be performed as an official duty. We have given some attention to that subject in a case recently decided, the decision in which, however, is not yet final. (*Hayes v. Handley et al.*, 28 Cal. App. Dec. 592. [Decided by supreme court February 18, 1920, 187 Pac. 952].)

[5] 4. The notice to redeem as given by the appellant as purchaser sufficiently referred to the improvement for which the property was sold and stated the amount required to be paid to effect redemption. The fact that it contained the statement that there would be added also "\$3.00 for the service of this notice and making affidavit thereto, as allowed by law," even though such charge was unauthorized, did not invalidate the notice. (*Simmons v. McCarthy*, 118 Cal. 623, at page 627, [50 Pac. 761].) [6] The affidavit of service of the notice to redeem we do not think was faulty in failing to state the name of the person upon whom service was made. The law requires such notice to be served "upon the owner of the property and upon the occupant"; the affidavit set forth that appellant, on the sixth day of February, 1914, as purchaser, did "serve upon the owner and occupant of said property a notice," etc. It was shown by the evidence of appellant that he in fact served a notice to redeem upon the plaintiff, who was also upon the property at the time. We think the objections as raised as to the irregularities which occurred subsequent to the date of delinquency of the assessments do not show such substantial departure from the requirements of the act as to invalidate the title obtained by the appellant.

The judgment appealed from is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2413. Second Appellate District, Division One.—March 21, 1919.]

PETER GRBAVACH, Respondent, v. CASUALTY COMPANY OF AMERICA (a Corporation), Appellant.

- [1] **INSURANCE LAW—REINSURANCE—ACTION ON POLICY—PLEADING.**—In an action against an insurance company and its reinsurer, an allegation that a certain reinsurance agreement was made “under the terms of which said . . . [reinsurer] reinsured all of the outstanding liability of defendant . . . [insurance company],” standing by itself does not show that such an agreement was made as to make the reinsurer liable to plaintiff for damages for personal injuries suffered by him while he was being conveyed as a passenger in an automobile, the driver of which carried insurance protection by policy issued by the defendant insurance company.
- [2] **ID.—INTEREST OF INSURED IN REINSURANCE.**—The original insured has no interest in a contract of reinsurance.
- [3] **ID.—ACTION AGAINST REINSURER—CONDITIONAL REINSURANCE—INSUFFICIENT EVIDENCE.**—In an action against an insurance company and its reinsurer, the evidence is insufficient to show any liability against the latter, where the only evidence offered is the contract of reinsurance, which provides that the reinsurer will adjust and settle the claims and losses of the insurance company in consideration of the assignment to such reinsurer in cash or securities of an amount equal and corresponding to the aggregate amount of the company’s legal loss reserves as of a certain date, and no proof is made of compliance with such provision of the contract.

APPEAL from a judgment of the Superior Court of Los Angeles County. E. P. Shortall, Judge Presiding. Reversed.

Bowen & Bailie for Appellant.

H. W. Kidd for Respondent.

JAMES, J.—The plaintiff herein recovered judgment against one Reed for personal injuries alleged to have been suffered while the plaintiff was being conveyed as a passenger in an automobile operated by the said Reed. Reed carried insurance protection by policy issued by the defendant Pacific Coast Casualty Company. By the terms of that policy the insurance company agreed that its liability thereunder would

inure to the benefit of any person who recovered judgment against the insured. Taking advantage of that condition, plaintiff, after securing judgment against Reed, brought this action against defendant Pacific Coast Casualty Company and joined defendant Casualty Company of America because of the fact that the latter company had entered into a certain reinsurance agreement with the defendant first named. The Casualty Company of America disclaimed any liability to the plaintiff here and appeals from the judgment entered against it.

It is insisted that in the complaint of plaintiff no cause of action was stated as against the appellant, and, further, that the evidence was insufficient to show that any liability had accrued under the alleged reinsurance agreement. It requires, indeed, a most liberal interpretation of the language used in the complaint in order to sustain it as sufficient in its statement of a cause of action against appellant. That portion of the complaint which purports to show such liability is as follows: "That as plaintiff is informed and believes and therefore alleges, on or about February 28th, 1916, the defendant Casualty Company of America entered into a certain re-insurance agreement with the defendant Pacific Coast Casualty Company, under the terms of which said Casualty Company of America re-insured all of the outstanding liability of defendant Pacific Coast Casualty Company, including the liability of said Pacific Coast Casualty Company by reason of the execution of the policy of insurance before mentioned, and said Casualty Company of America thereupon assumed all outstanding liability of said Pacific Coast Casualty Company, including all liability by reason of the execution of said policy of insurance by the defendant Pacific Coast Casualty Company." [1] The allegation that a certain reinsurance agreement was made and that "under the terms of which said Casualty Company of America re-insured all of the outstanding liability of defendant Pacific Coast Casualty Company," standing by itself, certainly does not show that such an agreement was made as to make the appellant liable for the damages alleged. [2] Under the code provisions, the original insured has no interest in a contract of reinsurance. (Civ. Code, sec. 2649; *Commercial Union Assur. Co. v. American Central Ins. Co.*, 68 Cal. 430, [9 Pac. 712].) By the language quoted, nothing is de-

scribed other than a contract of reinsurance such as defined by section 2646 of the Civil Code, and unless the latter part of the allegation quoted, that "said Casualty Company of America thereupon assumed all outstanding liability of said Pacific Coast Casualty Company, including all liability by reason of the execution of said policy of insurance by the defendant Pacific Coast Casualty Company," shows an extension of liability beyond that of an ordinary contract of reinsurance, the complaint was insufficient. The use of the words, "assumed all outstanding liability," may, perhaps, import that the contract was so extended, and under such construction it would be proper to hold that a sufficient cause of action is stated. [3] However, we think that the second point made as to there being a lack of evidence to substantiate the allegations of the complaint must be sustained. Plaintiff offered in evidence the alleged reinsurance agreement, from which it appeared that upon certain conditions stated—plainly prerequisite—the appellant agreed to adjust and settle the "claims and losses" of the Pacific Coast Company. As consideration therefor, the Pacific Coast Company was to "transfer, assign and set over to the 'Casualty' in cash or securities acceptable to the 'Casualty,' an amount equal and corresponding to the aggregate amount of the 'Pacific's' legal loss reserves as of December 31st, 1915. . . ." Plaintiff made no proof or showing that the Pacific Coast Company had complied with its obligations under the contract; hence, it would follow that there was no evidence from which it could be inferred that conditions had occurred which would require this appellant to settle the claims and losses of the Pacific Company. The appellant admitted the execution of the agreement and the filing thereof with the insurance commissioner of the state of California, but objected to the introduction in evidence of the same on the general ground that the evidence was incompetent, irrelevant, and immaterial. The case as made by the evidence of the plaintiff was incomplete, and for that reason the judgment cannot be maintained. The judgment appealed from is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2087. Second Appellate District, Division Two.—March 21, 1919.]

**CRYSTAL PIER COMPANY (a Corporation), Appellant,
v. WILLIAM SCHNEIDER et al., Respondents.**

- [1] **CORPORATION LAW—FORFEITURE OF CHARTER—TITLE TO PROPERTY—RIGHTS AND DUTIES OF DIRECTORS AS TRUSTEES.**—Under the amendment of 1907 to the act of 1905 (Stats. 1907, p. 746, sec. 10a), when a corporation forfeits its charter for nonpayment of the state license tax, the title to its property vests in those who are its stockholders at the time of its demise, the directors then in office becoming the trustees for the corporation and the stockholders to settle the affairs of the corporation, and as such they have possession of its property, with full power to deal with and dispose of the property as is necessary to settle the affairs of the corporation.
- [2] **ID.—DIRECTORS DONEES OF POWER IN TRUST—POWERS.**—The directors in office at the time of the forfeiture of the charter of a corporation in becoming trustees for the corporation and the stockholders become donees of a power in trust—the legal title being vested not in them, but in third persons—and as such, in the absence of fraud, collusion, or abuse of discretion, they may execute the power without the interposition of any court.
- [3] **ID.—POWER OF SALE IMPLIED.**—Since the “affairs” of a defunct corporation can seldom be settled without a sale or other disposition of at least some of the corporate assets, a power of sale necessarily is implied in the legislative grant of the power “to settle the affairs of the corporation.”
- [4] **ID.—POWER TO SELL LEASE—UNPAID RENTS—RIGHT OF PURCHASER.** The trustees of a defunct corporation, in the settlement of its affairs, have the power to sell a lease to property of which the corporation had been the owner and to transfer the right to all moneys unpaid thereon, thereby vesting in the purchaser the right to sue for the recovery of all rents due and unpaid.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Swanwick & Donnelly for Appellant.

No appearance for Respondents.

FINLAYSON, P. J.—This is an appeal from the judgment following an order sustaining a demurrer to the complaint. The action was to recover rents alleged to be due from defendants as lessees under a written lease executed to them by one McDonald, as lessor.

The case as made by the complaint, in so far as is necessary to an understanding of the question presented, is as follows: McDonald, the original lessor, transferred the lease and the property therein described to the Hollister Avenue Pier Company, a California corporation. Thereafter the Hollister Avenue Pier Company forfeited its charter for nonpayment of the state license tax. Thereafter the persons who, at the date of the forfeiture, were the directors in office of the defunct corporation, as trustees of the corporation and its stockholders, "for the purpose of settling the affairs of said corporation, and for the benefit of the creditors and stockholders thereof, granted, conveyed and assigned to plaintiff . . . all interest in or to the lease hereinbefore set forth, and the moneys unpaid thereon."

No brief has been filed on behalf of respondents. We are informed, however, by appellant's brief that the demurrer was sustained upon the theory that the assignment to plaintiff by the trustees of the defunct corporation transferred no right that plaintiff can assert in this action.

The amendment of 1907 to the act of 1905 (Stats. 1905, p. 493; Stats. 1907, p. 746, sec. 10a) provides that upon the forfeiture of a corporate charter the directors then in office "are deemed to be trustees of the corporation and stockholders, . . . and have full power to settle the affairs of the corporation."

The title to property owned by a corporation at the date of its demise does not pass to the directors who become trustees to settle its affairs. The corporation having ceased to exist, it no longer is capable of holding title or possession. The property formerly owned by it belongs to the persons who were its stockholders at the time it ceased to be a corporation. The directors who, upon the dissolution, become trustees for the corporation and stockholders, receive by the forfeiture only what the statute gives them, and that is a power over the property, not the title, and the right of possession, for without the right of possession they could not settle the corporate affairs. (*Rossi v. Cairz*, 174 Cal. 74, [161 Pac.

1161].) [1] After forfeiture of the charter the situation, then, is this: The title to all property that formerly belonged to the dead corporation is vested in those who were its stockholders at the time of its demise; the trustees to settle the affairs of the corporation have in their possession property belonging to those who were stockholders at the date of the dissolution; they are bound to settle the affairs of the former owner, the defunct corporation; they have all the power to deal with and dispose of the property that is necessary to accomplish that object.

[2] The "trustees," as the directors in office at the date of the forfeiture are designated by the statute, are the donees of a power in trust. Though the statute refers to the directors in office as "trustees," they are not trustees of a "trust," in any true sense of the term. In every true trust the legal title is vested in the trustee. Powers in trust differ from trusts in this, that in the case of such powers the legal title is vested, not in the trustee, but in a third person, but the donee of the power in trust can convey the title and dispose of the property to or for the beneficiaries. (3 Pomeroy's Equity, sec. 1002.) The statute makes the persons whom it refers to as "trustees of the corporation and stockholders" the donees of a power "to settle the affairs of the corporation." They are trustees only in the sense that the donees of a power to be executed for the benefit of another, though they have no title, legal or equitable, hold the power in trust to be executed in the interest of the beneficiaries. For reasons presently to be stated, they may, as donees of such power in trust, execute the power without the interposition of any court.

[3] Since the "affairs" of a defunct corporation, frequently exceedingly complex and multifarious, can seldom be settled without a sale or other disposition of at least some of the corporate assets, a power of sale necessarily is implied in the legislative grant of the power "to settle the affairs of the corporation." This power of sale should be exercised whenever necessary to serve the interests of the stockholders or creditors, though, as donees of such power, the persons referred to by the statute as "trustees" are vested with latitudinous discretion in determining whether a sale or other disposition of the corporate assets should be made—a discre-

tion with which, in the absence of fraud or collusion, the courts will not interfere.

The general rule is that in the absence of fraud, collusion, or abuse of discretion, the donee of a power of sale under an instrument executed by a private person, as, for example, an executor to whom his testator has donated such a power, may exercise it without the interposition of any court whatever. No license or authority from, nor, in the absence of statutory requirement, confirmation by, any court is necessary. The hand of the donee of a power of sale under an instrument executed by a private individual may be arrested by the courts only when he fraudulently intends to sell in breach of his trust. (31 Cyc. 1183; *Matthews v. Capshaw*, 109 Tenn. 480, [97 Am. St. Rep. 854, 72 S. W. 964]; *Feaster v. Fagan*, 135 Iowa, 633, [113 N. W. 479]; *Rice v. Coleman*, 87 S. C. 342, [Ann. Cas. 1912B, 1016, 69 S. E. 516]; *Sharp v. Loupe*, 120 Cal. 89, [52 Pac. 134, 586].)

Subject to the universally recognized rule of construction that, in interpreting legislative grants, it should be held that nothing passes but what is granted, expressly or by necessary implication, in clear and explicit terms, we know of no reason why a legislative grant of a power of sale for the benefit of the stockholders and creditors of a dead corporation, any more than the donation of a power of sale by a private individual, should be subject to supervision by the courts, in the absence of some statute expressly providing therefor. As the court said in *Rossi v. Caire*, 174 Cal. 74, [161 Pac. 1161], speaking of the act that makes the directors in office trustees to settle the affairs of the dead corporation: "The obvious purpose of this statute . . . is, as was said in the Havemeyer case (84 Cal. 362, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121]) above cited, 'to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the time of dissolution' (84 Cal. 365, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121]), and to render it unnecessary and improper for a court to intervene in their proceedings, or to supervise the sale in any particular, unless they are guilty of 'neglect of duty or abuse of power' (84 Cal. 367, [18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121])."

[4] For these reasons we hold that the "trustees" for the defunct Hollister Avenue Pier Company had the power to sell

the lease and to transfer the right to all moneys unpaid thereon—the transfer of a chose in action—thereby vesting in appellant the right to sue for the recovery of all rents due and unpaid.

Judgment reversed.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 2873. Second Appellate District, Division Two.—March 21, 1919.]

ALICE RUNYON et al., Appellants, v. THE CITY OF LOS ANGELES (a Municipal Corporation), et al., Respondents.

- [1] **APPEAL—ORDER DENYING NEW TRIAL.**—An appeal from an order denying a motion for a new trial taken after section 963 of the Code of Civil Procedure was amended in 1915, must be dismissed.
- [2] **ID.—DIRECTED VERDICT—RECORD.**—When exceptions are taken to a nonsuit, or to a directed verdict, all the evidence necessarily becomes a part of the case and should be included in the record on appeal.
- [3] **LANDLORD AND TENANT—LEASE OF PART OF BUILDING—INCIDENTS THERETO.**—A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised.
- [4] **ID.—LEASE OF STORE—APPURTENANCES.**—The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease.
- [5] **APPEAL — DIRECTED VERDICT — PRESUMPTIONS—APPURTENANCES TO STOREROOM.**—On this appeal from a judgment on a directed verdict, the appellate court, not having the complete evidence before it, was bound to indulge in every intendment in favor of the regularity of the court's procedure, and, therefore, was bound to assume that the basement under the leased storeroom in question, including the space under the sidewalk, was reasonably necessary to the enjoyment of such storeroom and passed with the lease thereof as a necessary incident or appurtenance.
- [6] **LANDLORD AND TENANT—COVENANT TO REPAIR.**—Where the lease to a storeroom carries with it, as a necessary incident or appurtenance, the basement thereunder, it also includes the iron grating that per-

mits the entrance of light and air to such basement, and the tenant's covenant to keep the leased premises in repair applies to it.

- [7] **MUNICIPAL CORPORATIONS—EXCAVATIONS UNDER SIDEWALKS—IRON GRATINGS—NUISANCE.**—An abutting owner, whose title extends to the center of the street, may excavate a vault or cellar under the sidewalk, and with the permission, express or implied, of the city authorities, may insert in the sidewalk, for the purpose of admitting light and air to the vault or cellar, an iron grating, or other similar device, if safely and properly constructed, and such contrivance in the sidewalk is not a nuisance *per se*.
- [8] **ID.—REPAIRS—DUTY OF OWNER.**—If such abutting property owner making the excavation and constructing the grating, coal-hole, or other similar device in the sidewalk does so with the permission of the proper city authorities, and the work is not inherently, in its nature and character, a nuisance *per se*, such owner is liable only in the event that he fails to use ordinary care and diligence in constructing the grating or other similar contrivance and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk.
- [9] **LANDLORD AND TENANT — FAILURE TO REPAIR — LIABILITY FOR INJURIES.**—When premises are in good repair at the time they are let, and the landlord, under the terms of the lease, is not bound to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from a failure to repair the pavement in front of the premises.
- [10] **ID.—COVENANT TO REPAIR—ORDINARY CARE.**—If, as originally constructed, the iron grating or other similar device in the sidewalk is safe and not a nuisance *per se*, and, at the date of the execution of the lease of the part of the premises to which it is solely appurtenant, it is safe and not, in its nature and character, a nuisance, the owner exercises ordinary care to keep it in such condition if he exacts from his lessee a covenant to make all necessary repairs.
- [11] **ID.—INJURY TO INVITEE—LIABILITY OF LANDLORD.**—One who, upon the express or implied invitation of the tenant, enters or is proceeding to enter upon the leased premises, is an invitee, and as such stands in the shoes of the tenant, and may not recover if the tenant cannot; and the tenant may not recover if the burden of repairing rests upon him.
- [12] **ID.—VOLUNTARY REPAIRS BY LANDLORD—ADMISSION OF LIABILITY.** Voluntary repair by a landlord of a defect in the demised premises after an injury resulting therefrom is not an admission of liability, and, therefore, in an action to recover for such injury, evidence of such a repair by the landlord is not admissible.

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. E. Joslin for Appellants.

Norman Sterry and Gibson, Dunn & Crutcher for Respondents.

FINLAYSON, P. J.—Action by husband and wife to recover damages for injuries to the wife, received from falling through a broken iron grating in the sidewalk in front of a barber-shop on the First Street side of the Nadeau Hotel Building—a building on the southwest corner of First and Spring Streets, in the city of Los Angeles, and owned by the defendants other than the city. The city's demurrer to the complaint was sustained without leave to amend, leaving the owners as the sole remaining defendants. At the conclusion of the evidence the court directed the jury to return a verdict for defendants. From the judgment and an order denying their motion for a new trial, plaintiffs appeal. [1] The appeal from the order must be dismissed, it having been taken after section 963 of the Code of Civil Procedure had been amended in 1915.

At the time of the accident the hotel was vacant, but all the ground floor storerooms on the First Street side of the hotel building were leased to tenants, including the storeroom known as 212 West First Street, in front of which, in the sidewalk, was the broken grating that was the cause of the injury. This storeroom was then occupied and used as a barber-shop by one Cooley, a tenant of the owners under a written lease wherein it is expressly provided that the tenant, at his own cost, shall make all necessary repairs during the term of the lease.

The broken grating, which was twenty-seven inches long by eleven and one-half inches wide at one end and ten inches at the other, was made of iron bars an inch in thickness, extending from end to end. At the date of the execution of the lease one bar was out of the grating. It was stipulated at the trial that Mrs. Runyon could not have been injured by

the grating with only one bar out. So that, though one bar was out at the date of the lease, the grating was not then dangerous, and therefore, at that time, not a nuisance. The second bar—the breaking of which caused the grating to become a menace to public safety and a nuisance—was broken by a third person while delivering paper to a subtenant who had sublet from Cooley a part of the basement under the barber-shop. Under each storeroom on First Street is a separate basement, separated by brick walls from the basement under each of the other storerooms and likewise from the hotel basement. The door to Cooley's barber-shop is set in from the line of First Street about six feet. On the right or west side of this inset is a bootblack-stand, extending from the line of the sidewalk to the door of the barber-shop. The iron grating came flush up to the property line. It was over an opening under the sidewalk that led into the basement under the barber-shop and gave light and air thereto. It was the custom of the owners, whenever they leased a storeroom, to deliver possession of the basement thereunder. Cooley testified that he bought the establishment from a Mrs. Sanborn, to whom the premises had been let under the written lease; that after the lease had been made to her, Mrs. Sanborn put him in possession of the storeroom; that afterward he asked the agent of the owners if the basement did not go with the storeroom, and that the agent said "Yes," and gave him the key. The agent for the hotel property testified that he knew the lease was assigned to Mr. Cooley; that he delivered the storeroom and basement to him; that Cooley asked him if the basement did not go with the lease; that he told Cooley it did, and gave him the key; and that whenever the owners of the building leased a storeroom they always delivered possession of the basement that is under such storeroom, without specifying the basement in the lease.

Immediately prior to the accident Mrs. Runyon and her cousin were on the north side of First Street, opposite the shoe-shining stand in front of Cooley's barber-shop. The cousin, desiring to have her shoes shined, crossed over to the shoe-shining stand, leading the way, while Mrs. Runyon followed, intending to wait for her cousin while the latter had her shoes shined. Without noticing the broken grating, Mrs. Runyon stepped into the opening made by the absence of the

two broken iron bars, and her right leg was jammed or crowded down between the remaining bars nearly to the knee.

[2] The record before us, as presented by the bill of exceptions, contains a part of the evidence, it appearing affirmatively therefrom that several witnesses, none of whose testimony is set forth, were sworn and testified. This being so, we very properly might affirm the judgment without any further discussion. When exceptions are taken to a nonsuit, or to a directed verdict, all the evidence necessarily becomes a part of the case. Such a ruling is based upon the entire evidence. It cannot be determined that the ruling was erroneous without an examination of all the evidence; for it may be that the error complained of was cured by the omitted evidence. However, we shall endeavor to dispose of the case on its merits, notwithstanding the incompleteness of the record, though the failure to include all the evidence in the bill of exceptions necessarily will compel us to resolve every material question of fact against appellants.

There are two crucial facts respecting which it cannot be said that the evidence before us is complete. They are: 1. Was the basement under Cooley's storeroom necessarily used with, or reasonably necessary to the enjoyment of, the storeroom as a barber-shop? and 2. Did the basement, as an independent and separate inclosure, include, as an integral part thereof, and separated from all other parts of the building, the excavation or space under the sidewalk over which the grating was constructed?

The written lease does not expressly mention the basement under Cooley's barber-shop. The language of the lease is: "That certain storeroom known and numbered as 212 West First Street, . . . said storeroom hereby leased being the room now occupied by the party of the second part. . . . The said storeroom is to be used by the party of the second part for the purpose of conducting a barber shop therein, for which said purpose it is now occupied by the party of the second part." [3] A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. (*Miller v. Fitzgerald Dry Goods Co.*, 62 Neb. 270, [86 N. W. 1078]; *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, [96 N. W. 487]; *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471,

[95 N. W. 688].) [4] The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease. (*Hall v. Irvin*, 78 App. Div. 107, [79 N. Y. Supp. 614]; *Browning v. Dal-esme*, 3 Sand. (N. Y.) 13.) From the testimony to which reference already has been made, it may be inferred that the basement was necessarily used with, and was reasonably necessary to the use of the barber-shop occupied by Cooley. *A fortiori*, it may well be that the evidence that was introduced in the court *a quo*, but not brought up by the record on this appeal, showed that the basement necessarily was used with the barber-shop, and that, therefore, it passed by the lease as an incident or an appurtenance to the storeroom described in the written document itself.

Appellants claim that the excavation under the sidewalk, over which was the grating that caused the accident, was no part of the basement occupied by Cooley—that it was not so physically connected with that particular basement as to be an integral part thereof and of that basement only. The agent for the property testified: "This basement under Mr. Cooley's store has no connection with or entrance into the hotel basement. It is separate. . . . The grating out of which the bars were broken was over an opening that led into Mr. Cooley's basement." From this it may be inferred that the basement under Cooley's store, shut off from every other basement by solid brick walls, included, as an integral part thereof, the space under the sidewalk over which the grating in question had been constructed, and that such excavation under the sidewalk was shut off from every other basement. At any rate, the incomplete evidence before us does not conflict with this view. Since every intendment must be indulged in favor of the regularity of the court's procedure, it will be presumed that if all the evidence were in the record it would support a state of facts sufficient to uphold the judgment.

[5] For the foregoing reasons we must assume, as unavoidable hypotheses, that the basement under the leased storeroom included the excavation over which the grating was constructed, separated from every other basement; that the basement was reasonably necessary to the enjoyment of the leased storeroom or barber-shop, and that, therefore, it passed with

the lease as a necessary incident or appurtenance. Upon this state of facts—a state of facts that we necessarily must assume would be established if all the evidence were before us—respondents are not liable.

[6] The written lease, if the facts be as we have stated them, included the iron grating that permitted the entrance of light and air to Cooley's basement, and the tenant's covenant to keep in repair applied to it. (*Boston v. Gray*, 144 Mass. 53, [10 N. E. 509]; *Rider v. Clark*, 132 Cal. 382, [64 Pac. 564].) The grating when originally constructed was not a nuisance *per se*. Nor was it, *per se*, a nuisance at the time when the lease was executed, though at that time one bar was broken; for the fact that one bar was out did not cause the contrivance to become a source of danger. [7] The abutting owner, whose title extends to the center of the street, may excavate a vault or cellar under the sidewalk. Such owner, with permission of the city authorities, express or implied—implied or inferred where, after a reasonable time, no objection has been made by the proper officials—may insert in the sidewalk, for the purpose of admitting light and air to the vault or cellar, an iron grating, or other similar device, if safely and properly constructed, and such contrivance in the sidewalk is not a nuisance *per se*. (*Rider v. Clark*, *supra*; *Morrison v. McAvoy*, 7 Cal. Unrep. 37, [70 Pac. 626]; *Hirsch v. James S. Remick Co.*, 38 Cal. App. 764, [177 Pac. 876]; *Fisher v. Thirkell*, 21 Mich. 1, [4 Am. Rep. 422].)

The original structure having been legal and in a safe condition when respondents leased the premises to their tenant, and the injuries having been received in consequence of the grating getting out of repair during the tenancy—the tenant and not the landlord being bound to repair—respondents are not liable as owners, or otherwise. [8] If the abutting property owner making the excavation and constructing the grating, coal-hole or other similar device in the sidewalk does so with the permission of the proper city authorities, and the work is not inherently, in its nature and character, a nuisance *per se*, the owner is liable only in the event that he fails to use ordinary care and diligence in constructing the grating or other similar contrivance and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk. (*West Chicago Masonic Assn. v. Cohn*,

192 Ill. 210, [85 Am. St. Rep. 327, 55 L. R. A. 235, 61 N. E. 439].) [9] When the premises are in good repair at the time they are let, and the landlord, under the terms of the lease, is not bound to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from a failure to repair the pavement in front of the premises. (*Lindstrom v. Pennsylvania Co.*, 212 Pa. 391, [61 Atl. 940]; *Fisher v. Thirkell*, *supra*.) The general rule is that it is the occupier, and he alone, to whom such responsibility *prima facie* attaches. (*Ahern v. Steele*, 115 N. Y. 203, [12 Am. St. Rep. 778, 5 L. R. A. 449, 22 N. E. 193]; *City of Lowell v. Spaulding*, 4 Cush. (Mass.) 277, [50 Am. Dec. 775].) To this general rule the following exceptions are recognized, and the owner of the leased premises may be made liable: 1. If the lease be one under which he, and not the tenant, is required to keep the premises in repair; 2. If the dangerous and defective condition by which the injury was occasioned existed when the premises were leased; 3. If that which occasioned the injury was, inherently, in its nature and character, a nuisance, and was upon the premises when the lease was executed. (*West Chicago Masonic Assn. v. Cohn*, *supra*.) The proof does not bring respondents within any of these exceptions to the general rule. The grating being safe at the date of the lease, the neglect which caused the injury to Mrs. Runyon was not that of respondents, but of their tenant Cooley, who had covenanted to keep the leased premises in repair.

It is contended that where the owner of a building is granted the privilege of excavating a vault under the sidewalk of a public street, and has constructed in the sidewalk an iron grating, coal-hole, or other similar device for the admission of light and air for the benefit of his premises, he assumes, by implication, the duty of keeping the sidewalk in as good condition and as safe for the public use as if the grating, coal-hole, or other like construction had never been made; that such duty is imposed by law for the public safety; and that, while the alienation of the entire premises, either permanently, as by deed, or temporarily, as by lease, will transfer the duty to the grantee or tenant, still the lease of a part only of the premises will not relieve the owner of the duty he owes to the public and cast the same upon the tenant of such leased part

of the entire premises, even though the opening in the sidewalk has no relation to any other portion of the building than that in possession of the tenant. This view seems to have obtained the sanction of the New York court of appeals in the case of *Canandaigua v. Foster*, 156 N. Y. 354, [66 Am. St. Rep. 575, 41 L. R. A. 554, 50 N. E. 971]. Of this case the Illinois supreme court in *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, [85 Am. St. Rep. 327, 55 L. R. A. 235, 61 N. E. 439], said: "Fowler, the owner and landlord, was not in possession, but the coal-hole had been constructed without the consent of the city, and constituted a nuisance, and Fowler let the premises with the nuisance upon them. His case fell within one of the exceptions to the general rule hereinbefore mentioned as recognized in this jurisdiction." The New York courts always have held the owner to a stricter accountability than is consistent with the weight of authority. (*Fisher v. Thirkell*, 21 Mich. 1, [4 Am. Rep. 422].) It is conceded by the courts of that state that the owner and landlord who has made the excavation under the sidewalk and constructed the iron grating, or other similar contrivance, may divest himself of all responsibility by demising or leasing the premises as a whole. If an owner who has constructed a contrivance that becomes a source of danger and a nuisance may divest himself of future responsibility under any circumstances whatever, as, for example, by demising the entire building, we fail to perceive why he may not equally divest himself of such responsibility by exacting from his lessee a covenant to keep the leased premises in repair, even though the premises so leased be but a part of the whole building, provided the contrivance in the sidewalk be used exclusively for the benefit of and in connection with that part of the building which is leased. The abutting owner is liable only in the event that he fails to use ordinary care in the original construction of the iron grating, or other similar device in the sidewalk, or in keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk. [10] If, as originally constructed, the contrivance is safe and not a nuisance *per se*, and if, at the date of the execution of the lease of the part of the premises to which it is solely appurtenant, it is safe and not, in its nature and character, a nuisance, the owner exercises ordinary care to keep it in such condition

if he exacts from his lessee a covenant to make all necessary repairs. The true rule—the rule that has the sanction of authority and reason—is stated by the Illinois supreme court as follows: “If the coal-hole and vault were constructed and are used for the benefit of the entire premises, the leasing of a portion, only, of the premises would not absolve the owner from his duty to use ordinary care to keep the coal-hole and the covering thereto in a good and safe condition; but if the vault into which the coal-hole opens has no connection with any other part of the building than the basement leased to the tenant, and no benefit inures from it to any other portion of the premises, and the tenant, as against the owner, has, and is entitled to have, exclusive possession and control of the basement, coal-hole, and vault, and has covenanted to keep the same in good repair, then the case should be regarded as within the operation of the general rule that the occupant of the premises, and not the owner thereof, is responsible for injuries received in consequence of a failure to keep the premises in repair.” (*West Chicago Masonic Assn. v. Cohn, supra.*)

[11] We have assumed in our discussion of the case that Mrs. Runyon was one of the general public using the sidewalk, and was not a guest or invitee of the tenant in possession. The rule is that one who, upon the express or implied invitation of the tenant, enters or is proceeding to enter upon the leased premises, is an invitee, and as such stands in the shoes of the tenant, and therefore may not recover if the tenant cannot; and that the tenant may not recover if the burden of repairing rests upon him. (*Mackey v. Lonergan*, 221 Mass. 296, [L. R. A. 1916F, 1098, 108 N. E. 1062]; *Leaux v. New York*, 87 App. Div. 398, [84 N. Y. Supp. 514].) In *Canandaigua v. Foster*, 156 N. Y. 354, [66 Am. St. Rep. 575, 41 L. R. A. 554, 50 N. E. 971], the general rule is stated: “It must be further conceded that if the store was in proper condition at the beginning of the term, the owner was not bound to repair it for the protection of those who, upon the express or implied invitation of the tenant, might enter it for the transaction of business or any other purpose.” Mrs. Runyon evidently proceeded to enter the space occupied by the bootblack-stand assuming that she would be permitted by the subtenant to enter upon and remain on his premises as a guest or invitee while her cousin was having her shoes shined.

[12] Appellants complain that the court erred in refusing to allow them to show that, after the accident, respondents, as owners, made and paid for repairs to the broken grating. Voluntary repair by a landlord of a defect in the demised premises after an injury resulting therefrom is not an admission of liability. (*Kearnes v. Cullen*, 183 Mass. 298, [67 N. E. 243].) However, as to this and all other complaints made by appellants respecting the admission or rejection of evidence, it may be said that every intendment is in favor of the correctness and regularity of the proceedings below, and that, since appellants have not brought up all the evidence for review, we will, if necessary, infer that the evidence not brought up cured the errors, if any there were. (*Barlow v. Barnes*, 172 Cal. 98, [155 Pac. 457].)

Appeal from the order denying the motion for a new trial dismissed.

Judgment affirmed.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 2877. Second Appellate District, Division Two.—March 21, 1919.]

SAN DIEGO INVESTMENT COMPANY (a Corporation),
Appellant, v. ALEX T. CRANE, Respondent.

- [1] JUDGMENT—FINDINGS AND CONCLUSIONS.—Findings of fact and conclusions of law do not constitute a judgment.
- [2] APPEAL FROM JUDGMENT—DISMISSAL.—Where no judgment appears in the judgment-roll as printed in the transcript, a purported appeal from a judgment will be dismissed.

APPEAL from a judgment of the Superior Court of San Diego County. C. N. Andrews, Judge. Appeal dismissed.

The facts are stated in the opinion of the court.

Sam Ferry Smith and Laurence H. Smith for Appellant.

E. S. Torrance for Respondent.

FINLAYSON, P. J.—The appeal is from “the judgment entered in the above-entitled court on the fourth day of February, A. D. 1916.” We have searched through the record in vain to find such a judgment, or, indeed, any judgment. There is none.

We do not know to what appellant refers when, in its notice of appeal, it says it “hereby appeals . . . from the judgment entered . . . on the fourth day of February, A. D. 1916,” unless it be the findings and conclusions of law, which, for some unaccountable reason, bear the indorsement, “Entered February 4th, 1916.” [1] These, however, do not constitute a judgment. (*Müller v. Sharpe*, 54 Cal. 590; *Thompson v. Lynch*, 43 Cal. 482.) The clerk’s certificate certifies that “the foregoing transcript on appeal is correct and contains a true copy of the judgment-roll in the action.” In the absence of anything to the contrary, we must assume that the clerk’s certificate states the truth; if it does, then the transcript “contains a true copy of the judgment-roll.” [2] Since no judgment appears in the judgment-roll as printed in the transcript, the only possible conclusion is that, as yet, no judgment has been given or made. There is therefore nothing from which to appeal, and the appeal should be dismissed. (*Miller v. Sharpe*, *supra*.)

Appeal dismissed.

Sloane, J., and Thomas, J., concurred.

[Civ. No. 1916. Third Appellate District.—March 23, 1919.]

G. T. AHLMAN, Respondent, v. THE BARBER ASPHALT
PAVING COMPANY (a Corporation), et al., Appellants.

- [1] **STREET LAW—DESCRIPTION OF DISTRICT—PLEADING—FINDING.**—In an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work, an allegation "that said resolution [of intention] described the district," is susceptible of no other construction than that the district was described *so as to be capable of identification*, and where such allegation is not denied, a finding "that the description of the district as given in said resolution of intention was not sufficient to identify the same," etc., is outside of the issues and contrary to the allegations of plaintiff's complaint.
- [2] **ID.—FINDINGS OUTSIDE ISSUES—WAIVER.**—While a finding of fact not in issue is sometimes upheld upon the theory that the parties have waived the point by their failure to object to the evidence, the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary.
- [3] **ID.—ASSESSMENT—INCLUSION OF IMPROPER ITEM—APPEAL—WAIVER.**—An objection to a street assessment on the ground that it includes an item paid to an abstract company for search of record on the property to ascertain the exact frontage of the lots is waived by failure to present such objection to the council on appeal to that body.
- [4] **ID.—OMISSION OF LOT—REMEDY.**—If a lot in an assessment district is omitted from the assessment, the remedy of a property owner feeling aggrieved thereby is by appeal to the council.
- [5] **ID.—SUFFICIENCY OF APPEAL—PROOF.**—On such an appeal, it is not sufficient for the property owner to allege that various parcels of property within the district have not been assessed to pay their proportionate share of the cost, but he must specify and designate the lot or lots which he claims were omitted, and on the hearing present evidence to the council to support his claim.
- [6] **ID.—ISSUANCE OF BONDS—PROCEDURE TO PREVENT.**—Since section 4 of the Bond Act of 1893 (Stats. 1893, p. 33) provides a simple procedure whereby a property owner may prevent the issuance of any bond for the assessment of his lot, he is in no position to complain of the issuance of bonds where he has not pursued the course prescribed.
- [7] **ID.—"NO SUFFICIENT LEGAL RESOLUTION"—CONCLUSION OF LAW.**—In an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work, a finding that "no sufficient legal resolution" of intention was passed is a conclusion of law.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. A. Beasley, Judge. **Reversed.**

The facts are stated in the opinion of the court.

William H. Johnson and J. A. Cooper for Appellants.

Beggs & McComish for Respondent.

BURNETT, J.—This is an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work in the city of San Jose. Similar actions were brought against the defendants by four other property owners. By stipulation, the actions were consolidated and tried together.

The only pleadings in the record before us are the complaint of the plaintiff, Ahlman, and an amendment thereto, and the answer of defendant, the Barber Asphalt Paving Company. Respondent, in his brief, states that said answer was adopted by the other defendants, and we will so consider it, although there is a reference in appellants' specifications to a separate answer of the defendants, Lightston and Farrell.

There is no denial in the answer of plaintiff's allegation of ownership of the property in question.

Paragraph 5 of the complaint alleges that the defendants and each of them claim some interest in or lien upon said property, but that such claims are wholly without right. The answer denies this allegation and alleges that defendant, the Barber Asphalt Paving Company, does claim a lien upon said property and that its claim is neither wholly nor at all without right. The court found in accordance with the allegation of the complaint.

Paragraph 6 alleges that "on April 14, 1913, the common council of the city of San Jose passed a resolution purporting to be a resolution of intention, and, on April 16, 1913, the same was approved by the mayor of said city, wherein and whereby it was resolved that Market Street, from San Carlos Street to First Street in said city, be improved by constructing thereon a pavement, consisting of two inches of asphalt," etc. "That said resolution provided that the cost of said work should be charged against a district, and described the district, which district included the land of the plaintiff herein-

before described; and said resolution further provided that ten-year serial bonds, bearing interest at the rate of seven per cent per annum, should be issued by the city treasurer to represent each assessment of \$25 or more; that no sufficient or legal resolution of intention was ever passed for the doing of said work; that the said resolution did not sufficiently describe the work to be done, or which was done thereunder, nor did it comply with the conditions of the charter . . . or of the Vrooman Act, so called, or of the said Bonding Act of 1893." The answer denied this allegation and a copy of the resolution of intention was attached and made a part of the answer "for all particulars therein and thereby appearing," and there was also annexed "the notice of street work" posted and published by the superintendent of streets pursuant to said resolution of intention. The finding (III) adopted the allegation of the complaint down to and including the following: "That said resolution provided that said work should be charged against a district, and described the district," and continued: "But the description of the district as given in said resolution of intention was not sufficient to identify the same, but was indefinite and such that it could not be located upon any particular land or lands within the city of San Jose. That said resolution purported to include the land of plaintiff herein described," and "that no sufficient or legal resolution of intention was ever passed for the doing of said work, nor did it comply with the conditions" of the charter or of said Street Bonding Act.

Paragraph 9 of the complaint alleged: "That on June 9, 1913, the mayor and common council passed a resolution ordering said work to be done, in accordance with the plans and specifications passed and adopted . . . on February 17, 1913. That said resolution was posted from June 23 to June 27, 1913." The answer alleged that it was declared in said resolution "that the public interest and convenience required to be done the street work in said resolution and in said resolution of intention described," and a copy thereof was made a part of the answer. There was no finding of the court upon this point.

It is alleged in paragraph 10 that, on June 20, 1913, the mayor and common council gave notice inviting proposals for the doing of said work, which was posted from June 23d to June 27th and not otherwise. Defendants made this notice

a part of the answer and alleged that it was "conspicuously posted near the chamber door of said mayor and common council on the twenty-third day of June, 1913, and was so kept posted thereafter for five consecutive days." The finding was in the language of the complaint.

Allegation 11 is that the defendant corporation put in a bid offering to do said work for certain specified prices. The answer amplified the allegation by enumerating the contents of said bid and stating that it was accompanied by a bond, etc. The finding followed the allegation of the complaint.

Paragraph 12 alleged the acceptance of said bid by the city authorities, the passage of the resolution awarding the contract to the corporation, defendant, and that said company entered into a contract to do said work according to the resolution of intention and said plans and specifications. The answer went into further details and attached a copy of the notice of award. It then proceeded to set out the various steps taken by defendant preliminarily to doing the work and alleged that it did perform the work to the satisfaction of said superintendent of streets. The finding was in the language of the complaint.

Paragraph 13 alleged that "the superintendent of streets made his warrant, diagram and assessment whereby the land of plaintiff . . . was assessed for the sum of \$951.69. That the total sum assessed upon said district contained large items which are not legally chargeable upon said district, or the lands embraced therein." The answer went into details concerning the preparation of the diagram and the assessment, and denied the allegation concerning illegal charges. The finding was in the language of the complaint and as to the last portion thereof it was: "That the sum of \$25 for making said assessment" was not legally chargeable upon the district or the lands embraced therein.

In paragraph 14 it was alleged that the assessments were not uniform or equal, which allegation was denied by the answer. As to this there was no finding.

There is no reference in the answer to the remaining allegations of the complaint. As to these the court found: That within the time allowed by law certain owners of property within the district appealed to the mayor and common council from said assessment and specified the particulars in which it was alleged to be illegal, which are fully set out; that said

appeal came on for hearing but was denied by the mayor and common council. There was then a finding that, prior to August 4, 1873, the portion of Market Street in question had been constructed, repaired, and fully improved and duly accepted by ordinance, which provided "that thereafter the roadway of said portion of said street should be kept open and in repair by said city, and that the expense thereof should be paid from the general fund"; and, that said ordinance has never been repealed. It was then found that it was not true that said diagram showed said land to be all within said district; that it was not true that the superintendent of streets estimated benefits arising from said work upon said lots within the district nor that he assessed the total sum upon the several pieces within said district; "but it is true that no assessment district was described in said resolution of intention . . . with sufficient certainty to identify the same."

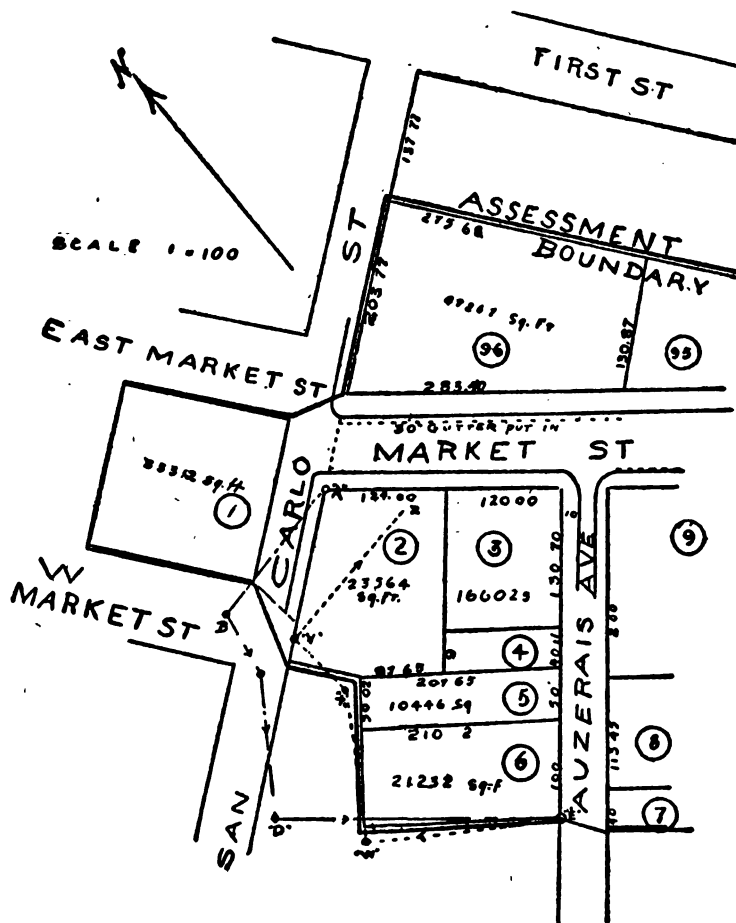
The judgment was that plaintiff was the owner in fee of the property referred to free and clear of all claims of the defendants or either of them; that neither of the defendants has any claim of lien upon said property, and that plaintiff is entitled to recover from the Barber Asphalt Company his costs, taxed at \$34.65.

1. The portion of finding No. 3, "that the description of the district as given in said resolution of intention was not sufficient to identify the same, but was indefinite," etc., is attacked by appellants.

In this connection, the claim of respondent is not only that the description is indefinite, but that, if it may be accepted at all, and the description contained in the resolution of intention had been properly delineated upon the diagram of the assessment district, there would have been included in said district a lot of land which is shown to have been excluded from the assessment.

Said description commences as follows: "Beginning at a point 160.45 feet westerly from the intersection of the westerly line of Market Street with the southerly line of San Carlos Street, running thence southerly 69.19 feet to a point; thence southwesterly 150.07 feet to a point; thence southerly a distance of 214.4 feet," etc. The last two calls in the description are: "Thence southerly along the easterly line of the west branch of Market Street to its intersection with the northerly line of San Carlos Street; thence southwesterly to the point

of beginning." In respondent's brief is a diagram of the portion of the district in question, which we here reproduce.



"The heavy solid line," says the brief, "shows the boundary of the district as shown on the diagram. The dot and dash line (B-C-D-E) shows where the boundary would have run if the description found in the resolution of intention had been followed. The dotted line (E-W-X-Y-Z) shows where the line would have run if traced backward from the point 'E' in the northerly line of Auzerais Avenue, which is the first point definitely fixed by a physical description. Neither of these lines coincide with the boundaries shown on the diagram.

"The plat we furnish herewith shows that there is no assessment on the parcel of land bounded on the northerly side by the southerly line of San Carlos Street and a portion of the line C-D; on the westerly side by a portion of the line D-E; on the southerly side by the northerly line of lots 6 and 5; and on the easterly side by a portion of the westerly line of lot 2."

R. C. McComish, one of the attorneys for plaintiff, testified: "I am familiar with First Street, in this city, I know the course of that street. It is about thirty degrees west of north. It runs northwest and southeast and varies from north to south about thirty degrees. I am familiar with San Carlos Street, in this city. It runs at right angles to First Street."

Irving L. Ryder, city engineer, testified: "I know First Street varies to the west. Take the monument line, generally speaking throughout the town, not for this particular street but in the neighborhood of the angle, San Carlos Street, there may be a variation of from one-half of a minute out, due to the variation of the monument, the general direction of the street. The streets are, generally speaking, at right angles to one another, but not absolutely; the variation of San Carlos between First and along past Market Street, is not more than one minute at any rate from a right angle to First Street."

W. E. McIntyre testified on behalf of defendants: "I assisted in preparing the description relative to the Market Street improvement. I was city engineer at the time. In connection with the map I could answer as to the intention of the description; with the map the intention and the resolution is perfectly apparent. I am familiar with the resolution of intention. Beginning the description at the intersection of the southerly line of San Carlos Street with the westerly line of Market Street, the description at that point had to be referenced out, . . . and then the point begins 160.45 feet westerly from that point of intersection . . . As I understood it, not knowing the technicality of law, the descriptions in cases of law, I understood westerly would naturally mean along the street line . . . I made the diagram that was finally used by the superintendent of streets for the purpose of making the assessment. San Carlos Avenue runs thirty degrees south of west."

The foregoing constitutes all the evidence in the record as to the description of said assessment district. It must be ap-

parent that plaintiff's showing was quite meagre. His diagram was not produced at the trial, nor, of course, introduced in evidence. It simply represents his deductions from the testimony of his own attorney and has been submitted in his brief for the inspection of this court. It is apparent that, according to the diagram which was made by the city engineer and upon which the assessment was based, the starting point of the description was located on the southerly line of San Carlos Street. This point was deemed to be 160.45 feet "westerly" from the intersection of said line with the westerly line of Market Street. Respondent, however, claims that this point is not due west from said intersection, but that to satisfy said call you must go across San Carlos Street to obtain the starting point as indicated on his diagram.

Following strictly the language of the description, we would probably have to agree with respondent's contention, although we consider it a fair conclusion from the whole record that the intention was to select said point in the southerly line of said San Carlos Street as the starting point for the description of the district. We may add, further, that if an error was made in the description as claimed by respondent, it is, at least, doubtful whether it was of a prejudicial nature.

[1] But, be that as it may, the finding as to the description is outside of the issues and is contrary to the allegation of plaintiff's complaint. While the complaint does not allege that the district was described *so as to be capable of identification*, we deem it susceptible of no other construction. Such is the necessary implication from the averment "that said resolution described the district."

[2] While the finding of a fact not in issue is sometimes upheld upon the theory that the parties have waived the point by their failure to object to the evidence, in other words, because they have treated the case as though it were a material finding, the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary.

[3] 2. Appellants attack the finding of the court that the sum of \$25 "for making said assessment" was not legally chargeable upon the district. The evidence disclosed that the item "was paid to the San Jose Abstract Company for search of record on the property to ascertain the exact frontage of the lots." It is not disputed that respondent's portion of this

was one dollar and such amount was added to his assessment. Several contentions in reference to it are made by appellants, but we may refer to one only, which is, that respondent cannot question the validity of the assessment on this ground, for the reason that he did not present it to the council on his appeal to that body. In said appeal he urged seven different and distinct grounds, but did not even suggest that the assessment was too large or that it contained any improper or illegal item. Of course, it must be presumed that if he had called the attention of the council to the fact that his assessment was thus excessive to the extent of one dollar, that tribunal would have relieved him from the burden of his charge. Such appeals contemplate the correction of errors like this, and it is entirely just and right that if a property owner fails to avail himself of this privilege thus accorded him by the law, he should thereafter be precluded from urging the objection.

The point is, indeed, covered by the decision of the supreme court in *Boyle v. Hitchcock*, 66 Cal. 129, [4 Pac. 1143], where it was held that "an objection to a street assessment in San Francisco, that it included an amount, as incidental expenses, for engraving and printing, was waived by a failure to appeal to the board of supervisors."

[4] 3. Another point made in favor of the judgment is that a lot in the district was omitted from the assessment and for this reason the whole assessment was void. There is no specific finding as to this, the court basing its judgment upon the ground, substantially, that no district was created since it could not be identified from the description. But if the point may be considered at all, it is sufficient to say that there is no such allegation in the complaint nor is there any evidence to support it. It is true that plaintiff's said diagram includes apparently a lot that was not assessed, but this diagram, as we have said, constitutes no part of the record. Besides, if such error was committed, the remedy was by appeal to the council. (*Buckman v. Landers*, 111 Cal. 347, [43 Pac. 1125].)

[5] It is true that an appeal was taken to said council and in support thereof it was alleged: "That various parcels of property within the district upon which said work has been made a charge, have not been assessed to pay their proportionate share of the cost of said work," but respondent should have specified and designated the lot or lots which he claimed were thus omitted. Moreover, the record does not show that

he offered any evidence in support of this claim, the transcript simply showing that "the proceedings relative to the Market Street paving was offered in evidence on appeal to the council. That said proceedings included all the records and proceedings in the office of the superintendent of streets connected with the assessment and were offered in evidence without argument." Manifestly, we cannot assume that any of those proceedings showed that any lot was improperly omitted from said assessment. In a matter of this kind it is as much incumbent upon the property owner to present evidence to the council to support his claim as it is to make the appeal. If he does not offer any such evidence he must abide by the finding against him.

4. Another point urged in the briefs is as to whether the Bond Act of February 27, 1893 (Stats. 1893, p. 33), under which admittedly the bonds involved herein were issued, is applicable to the city of San Jose.

There is no dispute that said city is operating under a freeholders' charter (Stats. 1897, p. 592); that this charter provides a system of street improvements and the collection of the costs thereof; that the improvement of streets is a municipal affair (*Byrne v. Drain*, 127 Cal. 663, [60 Pac. 433]), and that municipal affairs are regulated and controlled by the charter where it provides therefor and not by general laws passed by the legislature. (Cal. Const., art. XI, sec. 6; *Byrne v. Drain*, *supra*.) Said charter provides: "An act of the legislature of the state of California entitled 'An act to provide for work upon streets, lanes, alleys, courts, places and sidewalks and for the construction of sewers within municipalities, approved March 18, 1885, as since amended, and as hereafter shall be amended, is hereby adopted as a part of this charter and shall have the same force and effect as if incorporated at length herein, except where the provisions of said act conflict or are inconsistent with the provisions of this charter.'" Said act of 1885, commonly known as the Vrooman Act, as it existed at the date of the adoption of the San Jose charter, did not provide for the issuance of bonds for the payment of street assessments, although this scheme was thereafter included therein by amendment. The contention of respondent is, therefore, that the provisions of the Vrooman Act as they existed on March 5, 1897, became a part of said charter as though they had been expressly incor-

porated therein (*Ramish v. Hartwell*, 126 Cal. 443, [58 Pac. 920]; 2 Lewis' Sutherland on Statutory Construction, 787), but that subsequent amendments to said Vrooman Act cannot be so regarded, notwithstanding the said language of the charter, for the reason that the charter cannot be amended in that manner (art. XI, sec. 8), and the provision in the statute must yield to the rule laid down in the constitution. The conclusion is reached that said Bond Act as a part of the general law is no part of said charter. (*Byrne v. Drain*, *supra*; *Fritz v. San Francisco*, 132 Cal. 373, [64 Pac. 566]; *Sunset Telephone Co. v. Pasadena*, 161 Cal. 265), [118 Pac. 796].)

It is further claimed that said Bond Act was not adopted as a part of the charter by virtue of the reference in section 4, chapter 1, article VIII, as follows: "If bonds are to be issued pursuant to an act of the Legislature entitled 'An act to provide a system of street improvement bonds to represent certain assessments for the cost of street work and improvements within municipalities, and also for the payment of such bonds' approved February 27, 1893, and any assessment less in amount than \$50. remains unpaid for thirty days from the date of the warrant, or for five days after final decision on appeal, as provided in section 11 of said act, the Mayor and Common Council may, by resolution, order such assessment paid from the street contingent fund, and the superintendent of streets shall thereafter release said assessment on the books of his office, as upon payment in other cases." There is force in the contention that such reference to the Bond Act is not sufficient to make it a part of the charter. There is certainly no clearly expressed intention to adopt it, such as is found in reference to the Vrooman Act. Moreover, if the reference thereto be deemed sufficient to constitute it a part of the charter, then it would include said act as it stood in 1897. Said act at that time authorized the issuance of bonds only upon a finding by the council upon estimates of the engineer that the cost would be greater than one dollar per front foot along each line of the street (Stats. 1893, p. 33). The complaint alleges that there was no such estimate or finding and this was not denied. It would seem, therefore, that justification is not shown for the issuance of the bonds.

[6] However, we are satisfied that the plaintiff is in no position to complain of the issuance of the bonds. Section 4

of said Bond Act provides a simple procedure whereby the property owner may prevent the issuance of any bond for the assessment on his lot. This course was not pursued. As stated in *German S. & L. Soc. v. Ramish*, 138 Cal. 126, [69 Pac. 92]: "The bond creates no new liability and in effect provides for what by some would be regarded as more favorable payment, because in installments and after a period of years. However this may be, the lot owner cannot complain since he may pay the assessment and prevent the issuance of the bond." Of course, if plaintiff had made this objection, his land would still be subject to the assessment under the other provisions of the Vrooman Act.

It would be an unjust construction of the law that would permit the property owner to escape his obligation to pay for the improvement altogether, because a mistake may have been made in granting him the favor of payment for the benefit in installments. He is at least put to his election to choose which method of collection shall be pursued.

5. We have not noticed specifically the finding of the court that said Market Street had been previously "constructed, repaired, and fully improved to the satisfaction of the mayor and common council," and accepted by an ordinance duly passed with a provision that it should thereafter be "kept open and in repair by said city," for the reason that respondent at the oral argument disclaimed reliance upon that finding.

[7] We may add that the finding that "no sufficient legal resolution" of intention was passed is manifestly a conclusion of law and it requires no specific consideration.

The proceedings awarding the contract were in all respects regular and there is no claim of fraud of any kind. The Paving Company performed its contract fully and justly; it improved and regraded the street to the satisfaction of the city, and it hardly seems right that it should lose any compensation for its services by reason of the technical objections that have been made to the assessment.

We think the judgment and order should be reversed. It is so ordered.

Buck, P. J., *pro tem.*, and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 21, 1919, and a petition to

have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 19, 1919.

All the Justices concurred, except Lawlor, J., who was absent.

[Civ. No. 1909. Third Appellate District.—March 22, 1919.]

F. M. DREISBACH et al., Copartners, etc., Appellants, v.
LOUIS A. BRADEN, as Sheriff, etc., et al., Respondents.

- [1] **EXECUTIONS—SALE OF PROPERTY—THIRD PARTY CLAIMS—DUTY OF SHERIFF TO ADJUDICATE.**—It is not incumbent on the sheriff as a legal duty to settle any disputes which, after a sale on execution and the delivery by him to the purchasers of a certificate of sale, might arise between such purchasers and third parties as to the right to the possession of the property.
- [2] **ID.—BULKY PROPERTY—SYMBOLICAL DELIVERY.**—Where, as in this action, the property which is the subject matter of the execution sale is of that character and of such bulk in quantity that it is not capable of manual delivery, the sheriff, in the sale thereof, is only required, under section 699 of the Code of Civil Procedure, to make a symbolical delivery thereof to the purchasers.
- [3] **ID.—THIRD PARTY AS AGENT FOR SHERIFF—EVIDENCE.**—In this action against a sheriff and the surety on his official bond for alleged failure to deliver certain property sold to the plaintiffs at an execution sale, the contention of such plaintiffs that a third party who had claimed a lien on the property was the custodian of the property as the appointee and agent of the sheriff was not supported by the evidence—the facts being that a deputy sheriff was placed in charge of the property under a writ of attachment and remained in the capacity of keeper of the property until it was sold to the plaintiffs to satisfy their judgment, the property merely having been allowed to remain in a shed of such third party where it was located at the time of the levy.

APPEAL from a judgment of the Superior Court of Plumas County. H. D. Burroughs, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

C. L. Colvin for Appellants.

M. C. Kerr and H. B. Wolfe for Respondents.

HART, J.—The defendant, Braden, as sheriff of Plumas County, and the National Surety Company, as the surety on his official bond, were sued by plaintiffs for the sum of \$1,050, the alleged value of about 50 tons of chrome ore which they had purchased at an execution sale and which they alleged the sheriff had not delivered to them, and for damages caused to them by his failure so to deliver said ore. Defendants had judgment, from which plaintiffs prosecute this appeal.

The first finding of the court was: That all the allegations in plaintiffs' complaint in paragraphs 1 to 11, inclusive, are true.

Said paragraphs of the complaint, briefly, are: That plaintiffs at all times mentioned were copartners under the name of Zenith Chrome Mining Company and have complied with the laws of the state relative to copartnerships; that the defendant, National Surety Company, is a corporation organized under the laws of the state of New York and authorized to do business in the state of California; that defendant, Braden, is the sheriff of Plumas County and that he executed an official bond, with the usual covenants, with the defendant, National Surety Company, as surety, which was duly approved as required by law; that, on or about the twenty-second day of July, 1916, plaintiffs brought an action in the superior court of Plumas County against one C. W. Adams for the recovery of a sum of money alleged to be due and owing to them from said Adams; that, at the time of filing said complaint, plaintiffs filed the usual affidavit for the issuance of an attachment and that an attachment was issued and placed in the hands of the sheriff, which he served by attaching about 140 tons of chrome ore by taking the same into his custody and putting a keeper in charge thereof; that, on the thirty-first day of July, 1916, the sheriff made a return on said writ in which he certified that he had levied upon and taken possession of said 140 tons of ore; that, on December 13, 1916, a judgment was rendered in said action in favor of plaintiffs and against said C. W. Adams, for the sum of \$305 and costs; and, on the same day, execution was issued on said judgment, directing the sheriff to make the same out of prop-

erty belonging to said Adams; that the sheriff levied upon about 90 tons of chrome ore, being a portion of the 140 tons attached, and, on December 27, 1916, he sold the same after due and regular notice of such sale.

The court then found that defendant, Braden, as sheriff, "did deliver the possession of all property sold under execution to said plaintiffs as required by law."

Appellants complain of this last finding, urging that it is contrary to the evidence; and also that it is insufficient as a finding upon further allegations of the complaint.

The twelfth paragraph of the complaint was, that at said execution sale plaintiffs became the purchasers of the said 90 tons of chrome ore from the said sheriff; that at the time of the said purchase the property so purchased was in the possession and under the control of the sheriff; that plaintiffs, as such purchasers, paid the sheriff the full amount of the purchase price and demanded delivery of the property; that the sheriff did deliver to them about 34 tons of the property purchased by them, but failed and neglected to deliver about 50 tons thereof.

In the thirteenth paragraph it is alleged that plaintiffs were the highest bidders for the property so purchased at said sale and that the sheriff delivered to them a certificate of sale of about 90 tons of chrome ore. Written demand upon the sheriff to deliver said property was alleged and his refusal so to do, and that he has converted 50 tons to his own use. There were allegations as to the value of the property and the amount expended by plaintiffs in pursuit thereof.

The answer of defendants contained the following affirmative allegations: That the sheriff "levied upon about 34 tons of chrome ore then upon and under the depot station of the Western Pacific Railway Company's depot at Keddie, Plumas County, California, then represented by plaintiffs to defendant Braden as the property of said C. W. Adams, and thereupon placed a keeper in charge thereof; that at said time and pursuant to said writ said defendant Braden levied upon . . . about 50 tons of chrome ore situate in the barn of one W. C. Lawrence at Keddie . . . , at which time, and in the presence of plaintiffs, and of their attorney, L. N. Peter, the said W. C. Lawrence claimed said ore and claimed and asserted a lien thereon for and on account of transportation of the

same from the place where mined to the place where stored, and claimed to be and was then in possession thereof."

It appears that the plaintiffs brought two actions against the sheriff, one for the value of the property sold, the other for a failure to make a return to the execution. By stipulation, both cases were tried together. A motion for a new trial was made in each case and the same bill of exceptions was used on both. The result is that there is considerable testimony in the record which does not apply to the case before us.

Preliminarily, certain points made as to the issues tendered by the answer and as to the findings should be considered and disposed of.

The appellants are in error in the statement in their opening brief that the answer does not deny that the sheriff failed to deliver to the plaintiffs the ore in the Lawrence shed, and in the further statement that "all through the answer it is virtually admitted that he did not deliver the property." In paragraph 8 it is denied that "defendant, Braden, as sheriff, has failed and neglected, or failed or neglected or refused, in any manner or at all, to deliver all the property set forth and described in said certificate of sale." The answer, it is true, admits that the actual possession of the property was not delivered to the plaintiffs, but declares that said property was not capable of manual delivery. The answer, it may well be admitted, is not a model pleading of the "negative" kind, but there was no demurrer thereto and the denial referred to was sufficient to raise the issue as to the delivery of the property to the plaintiffs.

It is next asserted that the court failed to find upon the question whether, at the time the property was purchased by the plaintiffs, the property so purchased was in the possession and under the control of the defendant, Braden. The contention is unfounded. Paragraph 7 of the complaint alleges that, at the time of the purchase of the property by the plaintiffs, said property was taken into possession by said Braden and a keeper put in charge thereof by him. The court found that all of the allegations of said paragraph 7 of the complaint are true.

The objection that the court failed to make a specific finding upon the question whether the property was or was not capable of manual delivery is without merit in view of the finding that the property was delivered to the plaintiffs.

There are other objections with respect to the findings which do not call for special notice.

We will now proceed to a consideration of the merits of the case.

The whole controversy here rests, in the main, upon the solution of the question whether the property sold by the sheriff to the plaintiffs was capable of manual delivery. Another point which the appellants attempt to sustain is that the sheriff, upon attaching the ore, made one Lawrence the custodian of a certain portion of the seized property and that, upon the sale under the execution taking place, said Lawrence refused to deliver the ore to the plaintiffs. Thus, it is claimed, as the complaint charges, the defendant, Braden, converted the ore to his own use.

The circumstances attending the seizure of the property by attachment and the subsequent sale thereof under the execution by the sheriff are these: The defendant, as sheriff at the time of the issuance of summons in the case of the plaintiffs against the said C. W. Adams, levied, under written instructions from the attorney of the plaintiffs, an attachment on about 140 tons of chrome ore, about 40 or 45 tons of which were situated at the time of the levy in a wagon-shed on the premises of one W. C. Lawrence; that the sheriff, upon making said levy, placed in charge of the chrome ore so attached, as keeper, one L. P. McIntyre, a deputy sheriff under the defendant, Braden; that, at about the moment of time the levy was made on the ore situated in the shed of said Lawrence, the latter put in an appearance, whereupon he was asked by L. N. Peter, attorney for the plaintiffs, who, with the plaintiffs, was present when the levy was made, whether he (Lawrence) had any claim on the ore in the shed, and he replied that he had, the same being due for hauling or transporting the ore from the mine; that the sheriff then said to Lawrence that he would have to attach the ore, to which statement Lawrence replied: "You can go ahead and attach it, but you cannot move it. I hold a lien against it for hauling it from the mine." As stated, McIntyre, as the defendant, Braden's, deputy, was placed and left in charge of the ore as the sheriff's keeper and so remained until judgment was obtained and execution thereupon issued in the case. What occurred after the writ of execution was issued and placed in the hands of the sheriff may best be told by the testimony of that official

and also that of McIntyre. The sheriff testified, in part, as follows:

"I made a sale of the ore on the platform and also that in the shed. I do not think that Mr. Lawrence was present. I do not think that it was physically possible for me to make a delivery of the ore at the time of the sale. I would have had to get a team and horse. I might have done it in time. The weight of the ore in the shed was about 40 tons. The sale took place at Keddie, near the depot. . . . Mr. Nutting was there at the time. He was there as attorney for the plaintiffs. No demand was made by him for actual delivery. I made the sale. The money was turned over. We came back to town, and I gave him a certificate of sale. Mr. Nutting was present at that time, and Mr. Dickey. At that time there was no objection made, nor any demand for actual delivery. That property is not in my possession at the present time. I have not had control nor possession of the property since the sale. . . . I do not think that he [L. P. McIntyre] ever delivered it over to the purchasers, because Lawrence had a claim against it, and would not let it go. Lawrence never gave me any written claim. . . . I do not know what became of the ore in Lawrence's shed. I did not have anything to do with it after I sold it. I discharged McIntyre at the time of the sale." The sheriff further testified that, while in the first instance Lawrence claimed that he had a lien on the ore in his shed for services performed in hauling said ore from the mine, he later notified the sheriff to remove it from the shed, as he was in need of the use of the shed for other purposes and did not want the ore to be kept therein any longer. This conversation (said the sheriff) occurred a short time prior to the sale under the execution. At that time Lawrence said nothing about claiming a lien on the ore. The reason the sheriff gave for not removing the ore from Lawrence's shed was that a Mr. Nutting, who was also an attorney for the plaintiffs, advised him to do nothing in that regard "until I heard from him."

L. P. McIntyre, the deputy sheriff, who was made keeper of the attached property by the defendant sheriff, testified: "I was put in charge of the ore. I was in charge of it from the day of the attachment until the day of the sale. That was from somewhere in the latter part of July until the first part of January, or the latter part of December. I was there at

the time of the sale. Mr. Dickey, Mr. Braden, and Mr. Nutting were there. There was no demand made by Mr. Dickey or Mr. Nutting on Mr. Braden that manual delivery be made of the ore in Lawrence's shed. I never heard them make any demand for any such thing. . . . I considered I was discharged from custody when the sale of the ore was made. I did not regard it as the proper thing to deliver the ore to the purchasers. I would not deliver that ore to anyone."

It appears that the plaintiffs, neither at the time of the sale nor when the sheriff delivered to them the certificate of sale, demanded of that officer manual delivery of the ore. Indeed, it is clear from the evidence that they were perfectly satisfied with the situation after the sheriff's certificate was delivered to them until the time when Lawrence refused to permit them to take or remove the portion of the ore purchased by them which was at all times, from the date of the levying of the writ of attachment, situated in his (Lawrence's) shed.

The foregoing embraces a statement of the facts sufficient for the purposes of the decision of the points presented.

The contention of the appellants is that it was the duty of the sheriff to deliver the ore to them by manual tradition, while the respondents maintain that the property sold is of a character which rendered manual delivery thereof impossible or, at least, impracticable, and that, therefore, the mere execution and delivery by the sheriff to the appellants of a certificate of sale was as far as that officer could go, or, in fact, that could practicably be done by him with personal property of the nature of that which was the subject of the sale.

Section 698 of the Code of Civil Procedure requires an officer making a sale of personal property under an execution, where the same is capable of manual delivery, to deliver such property to the purchaser upon the payment of the purchase money by the latter. If desired, the officer must also execute and deliver to the purchaser a certificate of sale. Where, however, personal property so sold is not capable of manual delivery, the officer making the sale is, by the terms of section 699 of the same code, required only to execute and deliver to the purchaser, upon payment of the purchase money by the latter, a certificate of sale. In either case, the certificate so executed and delivered conveys all the right the debtor had in such property on the day the execution or attachment was levied.

1. It has been held that where personal property levied upon by attachment is of such a ponderable character as that its actual possession cannot be taken and its removal for that purpose effected by the officer levying the writ without injury to such property or great expense, the taking of actual possession by the officer or its removal to effectuate such possession may be dispensed with. It has frequently been held that "with regard to heavy and unmanageable articles there seems to be no necessity for an actual handling to constitute an attachment." (See cases and other authorities cited in footnote of *Hollister v. Goodale*, 21 Am. Dec. 680.) For further illustration, it has been held, under statutes similar to our own, that a stack of grain may be levied upon by going to it and making a formal levy, and forbidding the defendant from touching it. (*Gallagher v. Bishop*, 15 Wis. 276.) Again, a similar levy upon hewn stones (*Hemmenway v. Wheeler*, 14 Pick. (Mass.) 408, [25 Am. Dec. 411]; *Polley v. Lenox Iron Works*, 4 Allen (Mass.), 329); on iron ore (*Mills v. Camp*, 14 Conn. 219, [36 Am. Dec. 488]); and on mill logs (*Bicknell v. Trickey*, 34 Me. 273), has been upheld as sufficient.

In the case at bar, the validity of the seizure by attachment is not challenged. Nor is it questioned that the sheriff, upon levying the writ of attachment, took legal possession of the ore and continued in such possession to the time of the sale of the property under the writ of execution. Indeed, the appellants themselves insist throughout their whole argument that the sheriff took and had such possession. But, as has been observed, they say that upon the sale being made to them under the writ of execution, it was the legal duty of the sheriff to have made an actual physical delivery of the ore into their possession. We believe the property so sold to them was of a character that manual delivery thereof could not conveniently and without great expense be made by the sheriff. That officer could not, nor was it expected of him to attempt so impracticable and, indeed, so preposterous an act, to deliver the ore to the plaintiffs piece by piece. The most he could have done would have been to have loaded the ore on a wagon or truck and by such means have hauled or caused it to be hauled and so delivered to some place or point designated by the plaintiffs. He was not asked by the plaintiffs to do this, nor do we think he was required to do it, for, as stated, it would obviously have involved great expense to do so, thus

adding to the costs and so creating an additional burden which ultimately would fall on the shoulders of the debtor. Having made the sale to the plaintiffs and delivered to them the certificate of sale, the latter thereby acquired all the right the debtor had in the ore. They knew where the ore was situated and it was up to them to take possession of it. As to the claim that Lawrence made to a lien on the ore in his shed, it is to be remarked that the plaintiffs were at all times, from the time the writ of attachment was levied on the ore, aware of said claim. With such knowledge they accepted the certificate of sale without then making a demand on the sheriff for a manual delivery to them of the ore, and only made such demand after Lawrence had refused to deliver to them the ore that was in his shed at the time of the levy. [1] Obviously, it was not incumbent on the sheriff as a legal duty to settle any disputes which might after the sale and the delivery by him to the plaintiffs of the certificate of sale arise between plaintiffs and third parties as to the right to the possession of the property. [2] But however this all may be, it is, as above declared, clear to our minds that the property is of that character and of such bulk in quantity that it was not capable of manual delivery, and that the sheriff, in the sale thereof under the execution sale, did all that the statute required of him by making symbolical delivery thereof to the plaintiffs. Indeed, we can conceive of no case where section 699 of the Code of Civil Procedure would be more applicable than it is to the facts of this case.

[3] 2. The proposition that Lawrence was the custodian of the ore situated in his shed as the appointee and agent of the sheriff is not supported either by the evidence or the findings. McIntyre, the deputy sheriff, was by the sheriff placed in charge of all the ore seized by the latter under the writ of attachment and remained in the capacity of keeper of the property until it was sold to satisfy the judgment against Adams. It is true that the ore attached in the shed of Lawrence was allowed to remain there, but it was at all times in the legal custody of the sheriff through his keeper. There is not a word of testimony that Lawrence acted or was ever authorized to act as custodian of the ore for the sheriff.

The case of *Aigeltinger v. Whelan*, 133 Cal. 110, [65 Pac. 125], cited by appellants, in its facts bears no resemblance to this case. There the sheriff levied an attachment upon certain

personal property, and placed the same in a warehouse in charge of a keeper. Nearly two years later judgment was given in favor of the defendants and against the plaintiff in the action in which the writ of attachment was issued. Thereupon one of the defendants demanded of the sheriff that he return the property taken by him under the attachment, but the sheriff answered that he did not have the property, but that he had stored it in a warehouse and that the warehouseman had sold it for storage. The sheriff made no claim of lien on the property for any costs, charges, or keeper's fees. All these facts were proved at the trial, and it was held by the supreme court, in sustaining the judgment of the court below against the sheriff, that the latter, being charged with the duty of safely keeping the seized property and restoring the same to the defendant on his recovering judgment (Code Civ. Proc., secs. 540, 553), violated the duty so enjoined upon him by allowing the property to be sold or so disposed of. Thus it will readily be perceived that that case has no pertinent application to the facts of the instant case.

Our conclusion is that the plaintiffs have failed to make out a case against the sheriff, and the judgment is accordingly affirmed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

[Crim. No. 843. First Appellate District, Division One.—March 22, 1919.]

THE PEOPLE, Respondent, v. SAMUEL M. PREWETT,
Appellant.

- [1] CRIMINAL LAW—LIMITATION OF ARGUMENT—DISCRETION.—Under the circumstances in this case, the action of the trial court in limiting the argument of the defendant's counsel to the jury was no abuse of discretion.
- [2] ID.—INSTRUCTIONS—PENALTIES—ERROR.—In a prosecution for murder, the giving of instructions relating to punishment for murder in the first degree, for murder in the second degree, and for manslaughter, also relating to indeterminate sentences, although not to be commended, does not constitute prejudicial error where the

jury is further instructed that the penalty which may be attached to the commission of the crime must not influence them in determining the question of the innocence or guilt of the accused.

- [3] **ID.—APPEAL—ERROR CURED—PRESUMPTION.**—In such case, the last instruction would, if followed by the jury, have the effect of effacing whatever prejudice the defendant might have suffered from the giving of the instructions in relation to penalties; and in the absence of any indication to the contrary, the appellate court will assume that the jury did in fact obey such last instruction in its deliberations and in the rendition of its verdict.

APPEAL from a judgment of the Superior Court of Monterey County. Benj. K. Knight, Judge Presiding. **Affirmed.**

The facts are stated in the opinion of the court.

Feliz & White for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of murder in the second degree. The appellant urges three grounds for the reversal of such judgment. The first of these is that the court erred in limiting the argument of the defendant's counsel to the jury. This contention we find to be without merit. At the outset of the argument of the cause the judge of the trial court inquired as to how long a time it was expected by counsel would be consumed in argument, to which Mr. Feliz, one of the defendant's counsel, stated that on account of his having a severe cold he did not imagine that he would occupy an hour and a half, whereupon the court suggested that that was all the time that could be allowed on each side unless the session of the court were run into the night. No objection was at this time made by defendant's counsel to the court's suggestion, and the argument proceeded. After the opening argument on the part of the people, Mr. White, one of defendant's counsel, occupied an hour in opening the argument on behalf of the defense, and thereafter Mr. Feliz, in closing for the defense, spoke for an hour and ten minutes, at the end of which time the court made the following observation: "If we are to complete this case to-day, Mr. Feliz, I think you had better conclude your argument within

the next fifteen or twenty minutes." To this remark on the part of the court the defendant's counsel took an exception, and Mr. Feliz then proceeded with his argument, concluding the same within about ten minutes thereafter.

[1] Upon this state of the record we are satisfied that the defendant sustained no material detriment from the limitation of the argument of his counsel under the circumstances above set forth.

In the case of *People v. Morrell*, 28 Cal. App. 729, [153 Pac. 977], this court laid down the rule that "Trial judges have the right to regulate the proceedings in their courts, and have the right to exercise a reasonable discretion in the direction of limiting the arguments made by counsel."

We are of the opinion that there was no abuse of such discretion in the instant case.

[2] The next contention of the appellant is that the court committed an error in giving certain instructions to the jury with relation to the penalties for murder and for manslaughter. The record in that regard discloses that after the jury had been generally instructed by the court and had retired for deliberation it returned to the court for further instructions, whereupon the court proceeded to read to the jury sections 190, 193, and 1168 of the Penal Code relating to the punishment for murder in the first degree, for murder in the second degree, and for manslaughter, and also relating to the recent changes effected by the amendment of section 1168 (Stats. 1917, p. 665) in relation to indeterminate sentences. We are not pointed to any authority on the part of the appellant holding the giving of such instructions to be reversible error; but we are inclined to agree with the appellant's suggestion that the practice of giving such instructions is one that is not to be commended. Nevertheless, the record discloses that at the time of giving the foregoing instructions and as a part thereof the court gave to the jury the following instruction: "The jury is further instructed that its sole province is to pass on the guilt or innocence of the defendant and to determine the grade or degree of crime of which it finds him guilty, if it finds him guilty of any, and the matter of the penalty which may be attached to the commission of the crime must not in the slightest degree influence you in determining the question of his guilt or innocence. Nor shall such penalty influence you in the slightest degree in determining

the degree or grade of crime committed, if any. As you have been heretofore instructed, the defendant's guilt or innocence and also the degree or grade of crime committed by him, if any, must be determined by you from all the evidence in the case and not from the nature or extent of the penalty fixed by the statute for the commission of said grades or degrees of crime."

[3] The instruction last above quoted would, if followed by the jury, have the effect of effacing whatever prejudice the defendant might have suffered from the giving of the court's instructions in relation to penalties; and in the absence of any indication to the contrary, this court will assume that the jury did in fact obey the last above-quoted instruction of the court in its further deliberations and in the rendition of its verdict.

As to the appellant's final point, that the verdict of the jury is not sustained by the evidence, it is sufficient to say that the examination we have made of the record satisfies us that this contention must be resolved against the appellant.

No prejudicial error appearing in the record, the judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 19, 1919.

All the Justices concurred, except Lawlor, J., who was absent.

[Civ. No. 2099. First Appellate District, Division One.—March 24, 1919.]

IMPERIAL GAS ENGINE COMPANY (a Corporation), Appellant, v. JOE AUTERI, etc., Respondent.

[1] **SALES—PURCHASE OF MACHINERY FOR PARTICULAR PURPOSE—DEFECTS—KNOWLEDGE OF PURCHASER—FAILURE OF CONSIDERATION.—**

Where machinery is bought for a certain purpose, and after it is received it proves by trial not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price cannot be

defeated upon the plea of total failure of consideration, unless the evidence shows that the machinery was wholly valueless for any purpose.

- [2] **ID.—DUTY OF PURCHASER UNDER EXECUTORY CONTRACT—WAIVER OF DEFECTS.**—The purchaser under an executory contract for the sale of personal property is bound to accept the property, provided it conforms to the terms of the contract. Although the property may not be of the quality or description contracted for, he may, nevertheless, if he so elect, waive the defect, and acceptance of the property offered constitutes such a waiver. The duty devolves upon the purchaser to make an examination of the property tendered or delivered for the purpose of determining whether it fills the contract, and if from such examination he finds it does not, he must promptly reject it. This duty of inspection must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case.
- [3] **ID.—ACTION TO RECOVER BALANCE—FAILURE OF CONSIDERATION AS DEFENSE—CONTRACT NOT FULFILLED.**—In this action to recover a given sum alleged to be due as the final payment for a certain gasoline engine, the defendant having set up in his answer failure of consideration, it clearly appeared that the plaintiff never furnished and installed an engine and equipment as required by its contract with defendant, and that the latter's efforts and complaints were directed toward enforcing the proper fulfillment of the contract, and not merely concerning the installation of a magneto as part of the equipment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John J. Van Nostrand, Judge. Affirmed.

The facts are stated in the opinion of the court.

I. F. Chapman for Appellant.

Leon E. Prescott for Respondent.

WASTE, P. J.—Plaintiff brought suit against defendant to recover the sum of \$335 alleged to be due as the final payment for one 8 horse-power gasoline engine, which plaintiff had installed in defendant's boat. Defendant had judgment and plaintiff appeals.

Defendant, who is a fisherman by trade, desired to purchase a gasoline engine for a boat used in his business. He negotiated with plaintiff and a contract was made for the sale

by plaintiff and purchase by defendant of "One 8 H. P. (actual brake test) Imperial S/C gasoline engine," together with certain equipment. By the terms of the contract the engine was "guaranteed against defective material and workmanship for the period of one year." The terms of the sale were, \$25 on placing of the order, two hundred dollars within three days from date of the contract, and the balance of \$335 "on successful trial trip." Defendant made the first two payments as required by the contract and the engine was installed by plaintiff in the boat.

During the negotiation leading to the making of the contract, the question arose concerning a suitable magneto as part of the equipment and its cost. The written contract merely specified a "magneto," without further description.

After the engine was installed in the boat it was given a trial trip lasting one hour and a half. It had been previously tested in the shops of the plaintiff. Defendant did not make the final payment due under the contract. After various offers looking to a settlement of the matter, including a proposal on the part of defendant to pay a sum of money, less than the balance due, and to allow plaintiff to take back the engine and all of its parts, defendant, in writing, rescinded the contract and offered to return to plaintiff company all the property delivered by it to defendant, and demanded return to him of the \$225 paid on account of the contract. Plaintiff brought this action.

Defendant first set up in his answer failure of consideration of the contract, by reason of plaintiff's not having delivered a magneto of the value of \$65. He alleged that the magneto actually installed with the engine was second-hand and of the value of about \$3.50 and no more. Before the trial he amended his answer, setting out that the engine, pump and other accessories were defectively and improperly made, and of defective and inferior material, and that they were not usable, were of no value, and that thereby he was damaged in a sum in excess of the amount claimed by plaintiff.

Plaintiff's witnesses testified that the trial trip was satisfactory and that defendant was pleased with it and did not make any objection; that the engine was properly installed and "so far as they knew, the engine was in first-class running order and condition."

Defendant testified that on the day the boat was launched he informed plaintiff that the engine was defective. It stopped running the next day. After two or three days the pump leaked, water was thrown all over the engine and on the igniter, which caused the engine to frequently stop, leaving defendant on one occasion in a perilous position at sea. Defendant also testified that he made many and almost continuous complaints to plaintiff about the condition of the engine.

There is a conflict of testimony concerning the nature of these complaints. Plaintiff's witnesses testified that the contention between the parties was concerning the installation of the magneto as part of the equipment, and not over the improper installation of, workmanship, or materials in the engine. The president of the plaintiff company, however, testified when asked if there ever had been any demand made by defendant on the firm to repair the engine, that he "thought something of that kind occurred." The vice-president and secretary of the plaintiff company testified that he had "not seen the engine since it left the shop, but we have had lots of complaints from Mr. Auteri in the last six months or so." Correspondence passing between the attorneys of the respective parties does indicate that the question of the magneto entered largely into the complaints, it appearing that the one installed was a second-hand magneto, apparently taken from an automobile, whereas defendant claimed that he was to have been furnished a new one. It sufficiently appears, however, from all the testimony, including the correspondence, that, from the first trial of the engine in the boat, defendant informed plaintiff that it was defective and not suitable for any purpose.

A number of experts, and several fishermen, who were familiar with gasoline engines and the use which defendant made of his boat, testified, as a result of their examination and knowledge, concerning the defects of the engine installed therein. The substance of their testimony was that the pump on the engine was set out of line. The material in it was defective, which caused the bearings to wear, resulting in the leak hereinbefore referred to. Water fell on the fly-wheel and was thrown on the engine in the crank-pit. It was liable to get on the igniter and cause the engine to stop. The pump knocked. The reverse gear handle was loose. The babbits were loose in the main bearing on the crank shaft. The mechanical experts testified that these defects would not

manifest themselves in the time consumed by the so-called trial trip, but would show as soon as the parts commenced to wear. The experts also testified that these defects made it impossible, and dangerous, to use the engine for the purpose required by defendant, and that it was not a workable or usable engine.

The court found that the engine pump and accessories were defective in make, materials, and workmanship, and would not work, and that defendant was thereby prevented from using his boat for fishing and was damaged as alleged in the answer.

[1] Plaintiff's principal contention upon this appeal is that defendant could not retain the engine after a knowledge of the defects and defeat the action for the purchase price upon the plea of failure of consideration, and in support thereof cites the following: "Where machinery is bought for a certain purpose, and after its reception, it proves by trial not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price cannot be defeated upon the plea of total failure of consideration, unless the evidence shows that the machinery was wholly valueless for any purpose." (*Hardee v. Carter*, 94 Ga. 482, [19 S. E. 715].)

This is, no doubt, a correct statement of the law, but we think the testimony was sufficient to support the finding of the trial court, the substance of which was that the engine was so defective as to be wholly valueless for any purpose. Appellant contends that there was an unreasonable delay on the part of defendant in the premises; that his use of the engine for a period of more than two months, during which period he knew of its defects, operated as an election to accept the engine and precluded him from claiming that it was not of the character provided in the contract.

[2] "The rule is elementary as to the respective rights of the parties under an executory contract for the sale of personal property. As to the purchaser he is bound to accept the property, provided it conforms to the terms of the contract, or, if not according to the contract, he may reject or refuse to accept it. Although the property may not be of the quality or description contracted for, he may nevertheless, if he so elect, waive the defect, and acceptance of the property offered constitutes such a waiver. When personal property is tendered or delivered to a purchaser in fulfillment of a contract for the purchase thereof, the duty devolves upon

him to make an examination of the property tendered or delivered for the purpose of determining whether it fills the contract, and if from such examination he finds it does not, he must promptly reject it. This duty of inspection for the purpose of determining whether the property complies with the contract must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case." (*Jackson v. Porter Land & Water Co.*, 151 Cal. 39, [90 Pac. 125].)

[3] From the record in this case it clearly appears that plaintiff never furnished and installed an engine and equipment as required by the contract with defendant, and that defendant's efforts were directed toward enforcing the proper fulfillment of the agreement. Without again referring to the testimony in the case at bar, we are of the opinion that every point made by appellant, in support of its appeal, must be decided adversely to it, on the authority of *Sherman v. Ayers*, 20 Cal. App. 733, [130 Pac. 163], which was in many ways identical with the case presented here.

The judgment is affirmed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 2724. First Appellate District, Division Two.—March 25, 1919.]

GLENNIE DAVIES, Respondent, v. LUCIE C. RAMSDELL
et al., Appellants.

- [1] PLEADING—MOTION TO STRIKE OUT—EXCEPTION TO ORDER—APPEAL.—An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to under section 647 of the Code of Civil Procedure, therefore, in order that the objection may be urged on appeal, an exception must be taken at the time the decision is made.
- [2] DEED OF TRUST—SALE—PURCHASE BY CREDITOR—PAYMENT.—Where property is sold for the purpose of satisfying the indebtedness secured by it, and the property is struck off and sold to the owner and holder of said indebtedness for the amount of the debt, it is not necessary that the property should be actually paid for in

gold coin. The consideration for the property is the satisfaction of the indebtedness.

- [3] **ID.—VOID SALE—SECOND SALE—AUTHORITY—ESTOPPEL.**—Where in an action in ejectment it was stipulated that the deed under which plaintiff claimed title, which was executed by the trustee following a sale under a deed of trust, was a nullity, and thereupon judgment was entered accordingly, and thereafter the property was again sold to such plaintiff and a second deed issued to her, the trustor will be estopped from asserting in a suit to quiet title following such second sale that the trustee had no power to make such second sale.
- [4] **QUIETING TITLE—PLEADING—DERAIGNMENT OF TITLE—OWNERSHIP—CONCLUSION OF LAW.**—Where the plaintiff in an action to quiet title pleads the specific and detailed facts of her ownership and right of possession to the property in controversy and her special equities growing out of the relations of the parties, the further allegation that "by the proceedings hereinabove mentioned the plaintiff has become, and by such proceedings she now is, the owner of said real property and of the whole thereof," is but a conclusion of law, the denial of which in the answer will raise no issue.
- [5] **ID.—INSUFFICIENT ANSWER—JUDGMENT ON PLEADINGS.**—Where in such action the only denial was of the conclusion of law that the plaintiff was "the owner of said property and the whole thereof," the court properly granted plaintiff's motion for judgment on the pleadings.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. D. Dethlefsen and Peck, Bunker & Cole for Appellants.

Ralph R. Eltse and George Clark for Respondent.

LANGDON, P. J.—This is an appeal from a judgment for plaintiff in a suit to quiet title to certain real property in the county of Alameda. Defendant filed a motion to strike out parts of the complaint, which motion was denied; also a demurrer to the complaint, which was overruled; defendant then answered and judgment was given for the plaintiff upon a motion for judgment on the pleadings.

Instead of filing the ordinary short form of complaint to quiet title, plaintiff set up in the complaint in detail that the defendant executed a note and trust deed to evidence and se-

cure a loan of five thousand dollars made by the plaintiff to the defendant; that the defendant had defaulted in payments and the trustee had sold the property to satisfy the debt; that the sale was postponed under an arrangement between the plaintiff and defendant, and a dispute arose as to this arrangement; that it was claimed by the defendant that proper notice of the sale had not been given. It was further alleged that the plaintiff had sued the defendant in another action in which these facts were involved, and which was terminated by a judgment entered upon a stipulation that the trustee's deed be set aside, and that immediately after the entry of such judgment, the plaintiff requested the trustee to again advertise the property for sale, because of the default of the defendant, and after notice, the property was again sold to the plaintiff, and a second deed from the trustee made to her. It was also alleged in the complaint that the defendant disputes the ownership of the plaintiff and claims that she is entitled to hold the property and to refuse to pay the indebtedness; that these claims are made in bad faith and fraudulently for the sole purpose of harassing and annoying the plaintiff and exacting from the plaintiff a sum of money to get rid of such claims; that the defendant is insolvent and retains possession of the premises; that the defendant has failed to pay taxes and street assessments; that the rental value of the property is fifty dollars per month, and that a receiver should be appointed. Plaintiff prayed for a judgment that the defendant is estopped and barred by the judgment set up in the complaint; that the plaintiff is the owner of the real property; that defendant has no interest in the same; that defendant be enjoined from asserting any claim thereto, and that the plaintiff be awarded possession; and that, pending a final judgment, a receiver should be appointed.

In the answer, the defendant claimed to be the owner of the property in possession, and entitled to the possession. Defendant alleged that she made the note and trust deed; that for the purpose of defrauding her, the plaintiff entered into a conspiracy with the Berkeley Bank of Savings and Trust Company, named as trustee in the deed of trust, in pursuance of which the trustee sold the property to the plaintiff and executed a deed therefor, but that plaintiff paid no money to the trustee in support of her bid; that the plaintiff commenced the action and the defendant answered and

cross-complained, as stated in the complaint; that the judgment was entered thereon (the judgment being set up in the answer); that the value of the property is upward of ten thousand dollars; that the defendant is not insolvent; that the defendant had declared a homestead on the property; that in pursuance of the alleged conspiracy, the second sale by the trustee took place and the property was sold to the plaintiff for \$5,749.71; that the defendant had demanded the surrender of the canceled note, which had been refused; that the trustee knew that the plaintiff was the only person who could bid at the sale, because of the then condition of the title, the trustee having been so advised by the defendant; that the second trust deed was made in pursuance of the alleged conspiracy; that the trustee had no power to sell, and denies plaintiff's allegation that she is the owner of the property.

The motion to strike out was directed to all of the recitals of the complaint claimed by the defendant to be a mere de-rainment of title. The refusal to grant this motion is assigned by the appellant here as error. It does not appear from the transcript that exception was taken to the ruling refusing to strike out. It will be presumed that counsel acquiesced in the ruling and the objection cannot be urged on appeal. "An exception must be taken at the time the decision is made" (Code Civ. Proc., sec. 646) in all cases except those specified in section 647 of the Code of Civil Procedure. [1] An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to under section 647 of the Code of Civil Procedure. (*Ganceart v. Henry*, 98 Cal. 281, 283, [33 Pac. 92].)

The second objection of appellant is that the court erred in overruling the defendant's demurrer to the complaint. It is urged that the complaint is defective in not showing that an amount of money equal to that bid by the creditor at the sale was actually paid to the trustee, and that the trustee had divested itself of title by the first sale, and, therefore, had no power to make a second sale. In regard to the first objection, it appears from the complaint that the property was sold for the purpose of satisfying the indebtedness secured by it and that the property was "struck off and sold" to the owner and holder of said indebtedness "for said sum." [2] The consideration for the property was the satisfaction of the in-

debtedness, and it was not necessary that the plaintiff should actually pay for the property in gold coin. As to the second objection, it will be necessary for us to consider for a moment the judgment in the ejectment suit between the same parties, which judgment is set out in the complaint herein. It is admitted on this appeal, that in the ejectment suit, the plaintiff there, who is also the plaintiff and respondent here, relied upon the first trustee's deed and defendant denied the efficacy of that deed to pass title; whereupon the parties stipulated that the first trustee's deed was a nullity, and, upon the stipulation, judgment was entered as between those parties to that effect. Upon the present suit to quiet title the plaintiff relies upon a second trustee's deed, and the defendant says, notwithstanding the former judgment, no title passed under the second deed, because the original trustee conveyed title under the first deed, and in support of this position argues two points: (1) That despite the prior judgment that the deed was a nullity, as a matter of fact it conveyed legal title to the grantee named; and (2) the sale by the original trustee deprived the defendant of the benefit of competition of buyers, because nobody other than the holder of the legal title could buy without buying a lawsuit. This second contention may be disposed of very briefly, as it is without merit, for the reason that the judgment was as much a part of the chain of title as was the deed to the plaintiff, and any buyer would be presumed to know that in no action could the plaintiff in that case set up title of any character in herself by virtue of the first deed.

[3] A consideration of defendant's first objection convinces us that it, also, is without merit. Defendant contends that in the second suit (the present suit) she is not estopped by the consent adjudication in the first suit that the original deed was a nullity, because the original trustee was not a party to the suit and the deed was not in fact a nullity, but conveyed legal title to the plaintiff, which under the case of *Seccombe v. Roe*, 22 Cal. App. 139, [133 Pac. 507], placed her in a position of a substituted trustee for the original trustee.

When the stipulation was made and the judgment entered, the plaintiff, under the defendant's theory, combined in herself the two relations of trustee and beneficiary of the trust under the trust deed. She agreed with the defendant for the defendant's benefit, that the trust deed was a nullity for all purposes. The original trustee accepted the result of this

stipulation by executing at her request the second trust deed. Having had the benefit of one result of the stipulation in the first suit, the defendant must bear the burden of the other results of the stipulation, and in a suit between the same parties cannot be heard to say that the deed was effective for any purpose—contrary to the stipulation and judgment between the parties—and this regardless of any legal effect that the instrument may have had as between other parties. (*Himmelman v. Sullivan*, 40 Cal. 125.) The very basis of estoppel is that regardless of the real fact, the parties have placed themselves in a position where they will not be heard to assert any state of facts whether true or false in contravention of their agreement. This is as true as to estoppels of record as to estoppels *in pais*. (*Love v. Waltz*, 7 Cal. 250.)

A very similar question arose in the case of *Jackson v. Lodge*, 36 Cal. 38. That was an action to recover a piece of land, title to which was, in 1860, in one Turman under a deed absolute on its face, and which Turman subsequently conveyed to Lodge, the defendant, and after which he again conveyed to one Jackson. Jackson was the plaintiff and Lodge the defendant. It appeared that Jackson, Turman, and another, prior to the conveyance to Lodge, had borrowed money from him. Upon default, Lodge brought suit against Jackson and his comakers, Turman and the other. Turman allowed the judgment to go by default. Jackson and the other answered, setting forth that they executed the note for accommodation, and that shortly after the execution of the note, Turman, for the purpose of paying it, had conveyed the land to Lodge. Lodge denied the deed to him was made in satisfaction of the note. It was thereafter found that the deed was absolute and not a mortgage. Jackson, having succeeded in his defense against the note on the sole ground that the deed from Turman to Lodge was a conveyance of land in satisfaction of the note, then sought in the second suit to recover the same land under his subsequent deed on the sole ground that the conveyance was not absolute in satisfaction of the note, but a mortgage to secure it. It was urged that Turman, who had defaulted in the original suit, would not have been estopped by that judgment. The court said, in language directly applicable to this case: "The question now is not what title Jackson took by the conveyance, but whether he is concluded by the prior adjudication of the

same matter in which he and Lodge were parties, in which he was directly interested in determining the character of the conveyance, and in which it was found and adjudicated in his favor that his grantor had already conveyed the land to Lodge. The benefits of that adjudication he has fully enjoyed. For he has taken a title which, however good it may be, he has once litigated and had adjudicated and thereby estopped himself from further litigation. He did it with full knowledge of the facts and he cannot complain. At all events he is concluded."

It has been held in the case of *Donner v. Palmer*, 51 Cal. 629, that if the parties to an action in ejectment agree to facts which are based on the presumption that at a certain time a title was in a third person and the court decide on the facts, neither party can afterward be heard to assert, for the purpose of avoiding the effect of the judgment, that such third person had no title. We think this case answers the contention of appellant that the trustee had no power to convey at the time it executed the second deed to the plaintiff.

[4] The third objection of appellant is that the court erred in granting the motion of plaintiff for judgment on the pleadings. The appellant's position, in effect, is that even though the affirmative allegations of the answer should be held to constitute an estoppel, an issue was raised as to the ownership of the plaintiff by a denial of such ownership in the answer. As we have heretofore remarked, the complaint in this case did not contain the ordinary recitals of a complaint to quiet title. The plaintiff pleaded the specific and detailed facts of her ownership and right of possession to the real property in controversy and her special equities, growing out of the relations of the parties, the sale by the trustee, the stipulation and prior judgment between the parties, and the second sale to the plaintiff—and then she alleged that she had not voluntarily or involuntarily parted with any interest acquired by her, and that "by the proceedings hereinbefore mentioned the plaintiff has become, and by such proceedings she now is, the owner of the said real property and of the whole thereof." We think that under the special allegations of the complaint in this case this allegation of ownership is but a conclusion of law arising from the facts previously alleged and the denial of this conclusion in the answer raised no issue. While it is true that, in general, an allegation that a party is the owner

of real property is an allegation of an ultimate fact, and not of a conclusion of law, and there are a number of cases in this state so holding, yet it has been held also that the same averment may be a statement of fact or a conclusion of law, according to the context. (*Heeser v. Miller*, 77 Cal. 192, [19 Pac. 375]; *Levins v. Rovegno*, 71 Cal. 273, [12 Pac. 161]; *Turner v. White*, 73 Cal. 300, [14 Pac. 794].) In the present case, the complaint does not contain an allegation of unqualified ownership, but only an allegation of the consequences resulting from the transactions set forth in the complaint. The allegation is that "by the proceedings hereinbefore mentioned . . . the plaintiff is the owner . . ." etc. This is a legal conclusion, and its denial raises no issue. Furthermore, the denial by the defendant of this conclusion of law was a denial inconsistent with the facts admitted in the answer. It was in effect also a conclusion of law from the facts set out by the defendant, and it was, under our conclusions here, an erroneous conclusion therefrom. [5] Under such circumstances it cannot avail to prevent a judgment on the pleadings. (*Drew v. Pedlar*, 87 Cal. 444, [22 Am. St. Rep. 257, 25 Pac. 749].)

In addition to the cases above referred to, the case of *Hamman v. Milne*, 179 Cal. 634, [178 Pac. 523], holds that where, in a suit to quiet title, the defendants were precluded from attacking the validity of certain patents upon which the plaintiff relied, judgment on the pleadings is proper.

Under the pleadings in this case, we are of the opinion that judgment on the pleadings was proper.

The judgment is affirmed.

Haven, J., and Brittain, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 23, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 22, 1919.

All the Justices concurred.

[Civ. No. 2713. First Appellate District, Division Two.—March 25, 1919.]

GLENNIE DAVIES, Respondent, v. LUCIE C. RAMSDELL
et al., Appellants.

- [1] **RECEIVERS — EQUITY — DISCRETION — PRESUMPTION.**—Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of such power rests very largely in the discretion of the chancellor. Every presumption is in favor of the regularity of the order.
- [2] **ID.—CONFLICTING AFFIDAVITS — WHICH PREVAIL.**—If there is any conflict in the affidavits presented to the court, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also all facts which may reasonably be inferred or presumed from the direct and positive statements.
- [3] **ID.—ACTION TO REMOVE CLOUD FROM TITLE—ERRONEOUS APPOINTMENT OF RECEIVER—APPEAL.**—In an action in equity to remove a cloud on title, an order appointing a receiver *pendente lite*, though erroneous, will not be reversed on appeal where the appellant had no right to the possession of the property nor to collect its rents.

APPEAL from an order of the Superior Court of Alameda County appointing a receiver *pendente lite*. William H. Waste, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. D. Dethlefsen and Peck, Bunker & Cole for Appellants.

Ralph B. Eltse and George Clark for Respondent.

LANGDON, P. J.—[1] This is an appeal from an order appointing a receiver *pendente lite*, in a suit in equity, more resembling the old suit to remove a cloud on title than the code suit merely to quiet title. The appellant contends the order should not have been made, as such appointments are not usually made in suits to quiet title. In this case there were equitable considerations before the court in addition to those of the ordinary suit to quiet title. Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor.

Every presumption is in favor of the regularity of the order. Mere denial of the facts in the plaintiff's verified complaint and affidavits simply presents an issue of fact, which the court below determined adversely to the appellant. [2] If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also all facts which may reasonably be inferred or presumed from the direct and positive statements. (*Doak v. Bruson*, 152 Cal. 19, [91 Pac. 1001].)

[3] After the order appointing the receiver was made, judgment was rendered for the plaintiff, from which judgment the defendant below, the appellant here, appealed. The judgment has been affirmed. (*Davies v. Ramsdell*, ante, p. 424, [181 Pac. 94].) The decision on the appeal from the judgment, so far as it is based upon the same facts as those presented on this appeal, furnishes the law of the case. On the application for the appointment of the receiver both parties relied upon substantially the same facts as those set forth in the pleadings on which judgment was entered. (*Eversdon v. Mayhew*, 85 Cal. 1, [21 Pac. 431, 24 Pac. 382].) The judgment established the right of the plaintiff to the possession of the property and to be freed from all claims of the defendant as of the date of the filing of the complaint. At the date of the order appointing the receiver, the defendant had no right to the possession of the property nor to collect its rents. How, then, was she injured by the appointment of a receiver? Even though the appointment was erroneous, in determining this appeal the rule that the appellant must show injury as well as error would require the order to be affirmed for the reason that the reversal would not benefit the appellant. (*Horton v. City of Los Angeles*, 119 Cal. 602, [51 Pac. 956]; *Foster v. Smith*, 115 Cal. 611, [47 Pac. 591].) The order was a remedial process and was followed by judgment in favor of the prevailing party. In such a case the court will not revise the propriety of the order. (*Hicks v. Davis*, 4 Cal. 67; *Imperial Land Co. v. Imperial Irr. Dist.*, 173 Cal. 674, [161 Pac. 119]; *Adams v. Prather*, 176 Cal. 164, [167 Pac. 867]; *Estate of McSwain*, 176 Cal. 288, [168 Pac. 117].)

The order appealed from is affirmed.

Haven, J., and Brittain, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on April 23, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 22, 1919, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal of the first appellate district, division two, is denied on the ground last stated in the opinion of the district court of appeal, which is substantially that the judgment in favor of the plaintiff, on whose application the receiver was appointed, having been affirmed and having become final, it does not appear how the appellant could possibly have been prejudiced by the making of the order. We express no opinion upon the first question discussed in the opinion, viz.; the propriety of the appointment of a receiver in such a case as this.

All the Justices concurred.

[Civ. No. 2684. First Appellate District, Division One.—March 25, 1919.]

EILY S. M. GROSJEAN, Appellant, v. BOARD OF EDUCATION OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.

- [1] **SCHOOL LAW — RULES OF BOARD OF EDUCATION — SUSPENSION OR NONOBSERVANCE — WHO MAY COMPLAIN.**—A rule adopted by a board of education prescribing the procedure by which its rules may be amended or repealed is merely a rule of parliamentary procedure adopted for the guidance, and it may be the protection, of the members of the board, which they have power to suspend or ignore when occasion requires, and in respect to their action in so doing, no one but the members of the board have a right to complain.
- [2] **ID.—SUSPENSION BY UNANIMOUS ACTION.**—Such a rule is effectually suspended by the board through its unanimous action in passing an amendment without the formality prescribed therein.
- [3] **ID.—AMENDMENT OF RULES—NOTICE TO TEACHERS.**—A teacher may not be heard to complain that she was not legally notified of a

change in the rules, in that the principal failed to paste in her copy of the rules a copy of the change or amendment as required by the rules of the board, where she was personally made acquainted with the changed rule through having read the same.

- [4] ID.—SAN FRANCISCO CHARTER—DUTIES AND RELATIONS OF SUPERINTENDENT OF SCHOOLS—GENERAL LAW OF STATE.—The charter of the city and county of San Francisco, in assigning to the superintendent of schools, who is made by the charter an *ex-officio* member of the board of education, the specific duty of presenting charges against teachers for violations of the rules of the board, is to be regarded as a state law of equal dignity with the general laws of the state so long as it is not in conflict with them.
- [5] ID.—BIAS OR PREJUDICE OF SUPERINTENDENT OF SCHOOLS—DUTY TO PRESENT CHARGES.—Since the charter expressly imposes upon the superintendent of schools the duty of presenting such charges, any bias or prejudice which he might have will not affect his right and duty to prepare and present the charges.
- [6] ID.—HEARING OF CHARGES—DISQUALIFICATION OF SUPERINTENDENT OF SCHOOLS.—A teacher who has been dismissed cannot raise the objection, in a proceeding in *mandamus* to secure her reinstatement, that the superintendent of schools by reason of bias or prejudice, was disqualified to sit as a member of the board in the hearing and determination of charges which he had himself in the character of a prosecutor laid before that body, where her petition affirmatively shows that such superintendent of schools, while *ex officio* a member of the board, did not in fact sit or act as a member of the board in the final determination thereon.
- [7] ID.—QUASI-JUDICIAL TRIBUNALS—RULES AS TO DISQUALIFICATION. In relation to the acts of such inferior and only *quasi*-judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of regular judicial tribunals or officers have but a limited application.
- [8] ID.—DISQUALIFICATION FOR BIAS OR PREJUDICE—PRESENTATION OF OBJECTION.—An objection that the board of education is disqualified by reason of bias or prejudice to hear and determine the charges presented by the superintendent of schools must be presented at the inception of the hearing and must be supported by affidavits.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. E. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. W. Eastin for Appellant.

George Lull, City Attorney, and Milton Marks, Assistant City Attorney, for Respondents.

RICHARDS, J.—This is an appeal from a judgment in the defendants' favor after an order sustaining their demurrer to the sufficiency of the plaintiff's application for a writ of mandate.

The plaintiff, prior to May 12, 1917, had been a teacher in the public schools of San Francisco for many years, holding diplomas and certificates which entitled her to be a teacher therein and to be retained in such position unless dismissed therefrom for "insubordination, immoral or unprofessional conduct," after the presentation of charges and a hearing thereon as provided by law. It appears affirmatively from the plaintiff's petition that such charges were presented and a hearing had thereon before the said board of education, which thereupon made an order for the plaintiff's dismissal. It is the regularity and legality of this action on the part of said board which the plaintiff attacked by her petition and which she assails upon this appeal.

It sufficiently appears upon the face of the plaintiff's petition that the alleged dereliction of duty which furnished the basis of the charges which were preferred against her was that of insubordination, consisting first in violations of the rules of the board of education, by repeated absences from her place in the particular school to which she had been assigned, and, second, in insubordination, by failing or refusing to report at the office of the superintendent of schools when required to do so in order to explain such absences. The charges presented against the plaintiff to the board of education by the superintendent of schools on April 30, 1917, specifically asserted that the plaintiff had been absent from her duties without permission for seventeen school days out of a possible twenty during four weeks in the months of March and April, 1917, the dates of such absences being March 13th, 14th, 15th, and 16th, after which a vacation intervened from March 26th to April 9th; then followed absences on April 9th, 10th, 11th, 12th, 13th, 17th, 18th, 19th, 20th, 24th, 25th, 26th, and 27th. Prior to April 10, 1917, section 86 of the rules of the board of education read as follows: "Teachers desiring to be absent

from duty for more than one calendar week must give notice thereof to the board, stating the cause and duration of such absence. Such notification, made upon official blanks, and approved by the principal, must be sent to the board. In cases of sudden illness, or other emergency, teachers may absent themselves temporarily without permission for a term not to exceed five days."

On April 10th the board of education adopted the following resolution purporting to change this particular rule:

"Whereas regularity in attendance is a prime duty of the teacher; therefore be it

"Resolved, That section 86 of the rules be and it is hereby abolished and the following substituted therefor:

" 'In case of serious sickness or death in the family and of illness grave enough to keep a teacher at home or in a hospital, teachers may absent themselves without permission for a term not to exceed five days. Where teachers wish to absent themselves for other reasons they must notify the Board, stating the cause and duration of such absence, and obtain permission therefor, to be certified to them by the secretary of the Board of Education.' "

[1] It is the contention of the appellant that the foregoing change in said rule 86 of the board was not legally made, and hence ineffectual, for the reason that its adoption was in alleged violation of section 12 of the rules of the board, which provides as follows:

"Sec. 12. Any rules adopted by the Board may be amended or repealed by the affirmative vote of three members at any meeting, provided notice in writing of such intended amendment or repeal has been given at a previous meeting."

We perceive no merit in this contention. The section above quoted is merely a rule of parliamentary procedure adopted for the guidance, and it may be protection of the members of the board, and which they had power to suspend or ignore when occasion required, and in respect to their action in so doing, no one, but the members of the board themselves would have a right to complain. (*Hutcheson v. Storrie* (Tex. Civ.), 48 S. W. 785; *Greeley v. Hamman*, 17 Colo. 30, [28 Pac. 460]; *Cooley's Constitutional Limitations*, 7th ed., p. 113; *Heiskell v. Mayor etc. of Baltimore*, 65 Md. 125, [57 Am. Rep. 311, 4 Atl. 116].)

[2] Besides we think the rule referred to was effectually suspended by the board of education through its unanimous action in passing the amendment to rule 86 without the formality of the notice in writing of its proposed enactment required by section 12. (*People v. Common Council of Rochester*, 5 Lans. (N. Y.) 11; *Nelson v. City of Omaha*, 84 Neb. 434, [121 N. W. 453].)

[3] It is next contended by the appellant that she was not legally notified of the change thus made in rule 86 of the board and was therefore not bound by it. This contention is predicated upon section 47 of the said rules, which reads as follows:

"Sec. 47. Principals, when officially notified of any changes or amendments to these rules, shall immediately cause them to be neatly inserted in the copy of the rules belonging to each teacher in their respective schools."

While it is conceded by the respondent that the record does not affirmatively show that this requirement was complied with, it is pointed out that the plaintiff nowhere alleges that she was not personally made acquainted with the fact and substance of the change in the rule within a day or two after such change was made. On the contrary, the plaintiff sets forth in her petition the full text of the charges made against her, wherein it appears that her principal directed her attention to the new rule regarding absences of teachers shortly after its passage, and that she then read it. This statement the plaintiff nowhere denies; and since the rule imposing upon principals the duty of pasting copies of changes made in the teachers' books of rules has for its only purpose the giving to such teachers notice of the text of changes thus made, this purpose was fully subserved by the plaintiff's reading of the rule.

[4] This brings us to a consideration of the charges which were presented against the plaintiff, and the procedure thereon, to which the plaintiff and appellant offers several more or less specific objections. The charges were presented by the superintendent of schools acting under the express authority and duty conferred upon him by the terms of the city charter, which in chapters I to VI of article VII thereof provides a system of government of the public schools of San Francisco in amplification of the provisions of the Political Code. We perceive no valid objection to the assignment of

this specific duty to the superintendent of schools, who is made by the charter an *ex-officio* member of the board of education. The charter in creating these duties and relations is to be regarded as a state law of equal dignity with the general laws of the state so long as in school matters it is not in conflict with them. (*Stern v. City Council etc.*, 25 Cal. App. 685, [145 Pac. 167].)

Turning now to the substance of the charges themselves, we find that the plaintiff was therein charged with having been absent from her duties four days in the middle of March, 1917, without excuse; that she was again absent during all of the school days of the week commencing April 9, 1917; and was again absent during all of the school days of the following week excepting Monday, if school was held on that day; and was again absent on all of the school days of the succeeding week, again excepting Monday, all of which absences were without permission or excuse. It would be a very strained construction of rule 86 of the board of education as it read prior to April 10, 1917, which would permit teachers without the excuse of illness or other emergency to absent themselves from their place and duty for three successive weeks with the exception of two separate intervening days, without being liable to the charge of dereliction of duty; even, therefore, if rule 86 had not been validly amended on April 10, 1917, as the plaintiff charges, these unexplained absences would have been a violation of both the letter and spirit of the original rule. The change in the rule effected by its valid amendment on the latter date puts the matter, however, beyond dispute, since the amendment requires that teachers wishing to absent themselves from their places for any other reasons than serious sickness or death in their families, or illness of themselves grave enough to keep them at home or in the hospital, must notify the board of education of the cause and duration of such absences, and obtain permission therefor. Under this amended rule the plaintiff by her absences after April 10, 1917, or at least after the rule as changed had been read by her within a brief time thereafter, had subjected herself to the charges which were preferred against her. These charges further specify that on April 18, 1917, the board of education by letter of that date directed the principal of her school to notify the plaintiff to report to the office of the superintendent of schools, but owing to her absence, this notice was not con-

veyed to her until April 23d, which was one of the Mondays when she was at school. She did not so report nor attempt to do so until after the close of school hours on that day, when she did attempt to report, but failed to find the superintendent in his office. On the following Monday she called the superintendent on the telephone, when he told her that he had prepared charges against her. On that day she again absented herself without permission for the remainder of the week.

The foregoing facts form the basis of the charges which the superintendent presented to the board on April 30, 1917. Upon their presentation the board suspended the plaintiff, and fixed the date of hearing thereon for May 12, 1917, of which the plaintiff had due notice. She appeared before the board on that day and pleaded not guilty to the charges, but apparently offered no objection to the right of the superintendent to present, or of the board to hear, such charges upon any of the grounds of bias, prejudice, or interest which she now urges against the legality of the proceeding. Upon the hearing upon said charges, and after the taking of evidence *pro* and *con* thereon without objection on the plaintiff's part, the board made its findings sustaining said charges and dismissing her from her position as a teacher in the public schools. The plaintiff appealed to the superintendent of schools within the time and in the manner provided by the school laws, which appeal was denied by the superintendent on June 4, 1917. To the charges thus presented, the hearing thus held, the findings and order thus made, and the appeal thus taken and determined, the plaintiff presented certain objections in her petition, and has reiterated these upon this appeal.

[5] The chief of these objections, aside from those already noted and disposed of, relate to the alleged disqualification of the superintendent to present, and of the members of the board of education to hear and determine, said charges by reason of the asserted bias and prejudice of these officials. As to the alleged disqualification of the superintendent of schools to present charges, there is no merit in the plaintiff's claim, since the charter expressly imposes the duty of presenting such charges upon that particular official, and any bias or prejudice which he might have could not affect his right and duty to prepare and present the charges in question. The more serious part of the objection is that relating to the alleged disqualification of the board of education to act in the hearing

and determination thereon. [6] The first part of this objection embraces the asserted disqualification of the superintendent of schools to sit or act as a member of the board in the hearing and determination of charges which he has himself in the character of a prosecutor laid before that body. Such an objection might in a proper case prove effectual, but not in the case at bar, since the plaintiff's petition affirmatively shows that the superintendent of schools, while *ex officio* a member of the board, did not in fact sit or act as a member of the board in the final determination thereon. [7] But aside from this we think the authorities quite consistently hold that in relation to the acts of such inferior and only quasi-judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of regular judicial tribunals or officers have but a limited application. In the recent case of *Federal Construction Co. v. Curd*, 179 Cal. 489, [2 A. L. R. 1202, 177 Pac. 469], this subject was quite fully discussed in a case not distinguishable in principle from the case at bar, and in which the court declared it to be the settled rule "that the interest of one or all of the members of boards of trustees, city councils, or other municipal bodies charged with the making or rectifying of assessments for street or other improvements, may have, arising from the fact of their ownership of property directly affected by the proposed improvement, does not create such a disqualification to sit or act in the premises as to render their action void as not constituting due process of law." Other cases bearing upon the same subject and applying the same rule to officials sitting upon the hearing of charges against municipal officers are the following: *Riggins v. Richards*, 97 Tex. 229, [77 S. W. 946]; *State v. Common Council*, 90 Wis. 612, [64 N. W. 304]; 2 McQuillin on Municipal Corporations, sec. 565.

[8] Aside, however, from these considerations, the plaintiff's petition discloses that the plaintiff's objection to the action of the board of education or any of its members in proceeding to try her upon the charges presented by the superintendent of schools upon the ground of their or any of their disqualification by reason of bias or prejudice was made for the first time after the trial, decision, and order for her dismissal, and in her appeal to the superintendent for a re-

versal of such decision and order, and that her objection then taken was merely the general one "that the said findings, decision, and order were the result of passion and prejudice on the part of said board of education." Such an objection came entirely too late, even had the same been valid, since it is a general rule of law applicable to the alleged disqualification of judicial officers, that the objection upon that ground must be presented at the inception of the hearing and must be supported by affidavits. This rule and the reasoning which supports it also applies to the appeal taken by the plaintiff to the superintendent of schools, against whom she makes for the first time in her petition a similar charge, but to whom she committed her cause upon appeal without objection as to his personal qualification to hear and act upon the same. Our conclusion upon this branch of the case is that the board of education and the members thereof were not disqualified to hear, entertain, and determine the charges presented against the plaintiff, or to enter the order for her dismissal from the school department based thereon.

We do not deem it necessary to discuss the other points presented by the appellant upon this appeal.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 22, 1919.

All the Justices concurred.

[Civ. No. 2667. First Appellate District, Division One.—March 25, 1919.]

CONSOLIDATED CONCESSIONS COMPANY (a Corporation), Appellant, v. EMMETT W. McCONNELL, Respondent.

- [1] **PLEADING—CORPORATE EXISTENCE—INSUFFICIENT ALLEGATION.**—A complaint in an action by a corporation which alleges that it was incorporated on or about a stated date, but which does not allege that it continued to be such corporation for or at any time thereafter, or that it was a corporation at the time of any of the transactions referred to in its pleading, or at the time of the institution of the action, is demurrable.
- [2] **ID.—ACTION TO CANCEL DOCUMENTS—EXISTENCE OF—INSUFFICIENT COMPLAINT.**—Where the main purpose of an action is to have certain documents rescinded, canceled, and surrendered, and there is no allegation in the complaint that such documents ever in fact came into being or were in existence or in the possession of or under the control of the defendant at the time the action was begun, the complaint is insufficient.
- [3] **ID.—RECOVERY OF MONEY—BONA FIDE STOCKHOLDERS—ESSENTIAL ALLEGATIONS.**—Allegations that the defendant used the corporation as a "tool and cat paw" of himself and a fellow-conspirator, and as a "means and instrumentality of defrauding and swindling the public, by which process he wrongfully and fraudulently" received from the corporation a stated sum of money "paid into said company by the public as the proceeds of plaintiff's stock," are entirely insufficient to base a right of action in favor of the corporation for the recovery of the money, where there is no allegation as to the existence of *bona fide* stockholders of the corporation not parties to the wrongful acts.
- [4] **ID.—ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND—DISCRETION.**—The refusal of leave to amend after sustaining a demurrer to a fifth amended complaint is not an abuse of discretion.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. D. Newhouse and Milton Shepardson for Appellant.

Wise & O'Connor for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of the defendant after an order sustaining his demurrer to the plaintiff's fifth amended complaint. The action purported to be one instituted by the plaintiff as a corporation to annul and cause to be canceled a certain contract between the plaintiff and the defendant for the sale by the latter and purchase by the former of certain capital stock in other corporations, and for delivery up for cancellation and annulment of a certain promissory note of the plaintiff for the sum of five hundred thousand dollars, and for the cancellation and annulment of sixty thousand shares of the capital stock of plaintiff, which was to have been issued to the defendant pursuant to said contract, and for an accounting between the defendant and the plaintiff as to the funds received by the former as a result of these transactions, and for general relief.

The demurrer of the defendant to the fifth amended complaint was both general and special, and was sustained by a general order of the trial court, and from the judgment thereupon entered the plaintiff prosecutes this appeal.

[1] A mere cursory view of the plaintiff's fifth amended complaint will serve to show that the defendant's demurrer to its sufficiency was well taken upon several grounds. In the first place, while it is averred that the plaintiff was incorporated on or about July 15, 1913, there is no averment that it continued to be such corporation for or at any time thereafter, or that it was such corporation at the time of any of the transactions referred to in the plaintiff's pleading, or at the time of the institution of this action in the month of April, 1917. The defendant's demurrer aimed at this defect is both general and special, and obviously is good. [2] Again, this complaint alleges that certain transactions, embracing the execution of a contract with the defendant and the issue of certain stock to him pursuant thereto, and the receipt from him as the consideration therefor and for the promissory note of the plaintiff, of certain shares of stock of other corporations, was purported to be authorized by certain resolutions purporting to have been adopted at certain meetings of the corporation which were never held, but the complaint fails to aver

that such contract was ever in fact executed or acted upon, or that such stock was ever in fact issued; or that said promissory note was ever executed or delivered to the defendant; in a word, the complaint utterly fails to aver that the several instruments which it is the main purpose of the action to have rescinded, canceled, and surrendered, ever in fact came into being or were in existence or in the possession of or under the control of the defendant at the time the action was begun.

[3] A yet more serious deficiency in the complaint before us is this: The action is one apparently to set aside the contract, stock, and promissory note authorized to be issued to the defendant at fictitious meetings of the directors of the corporation who were merely nominal stockholders therein, who are alleged never to have had any interest therein or to have given any consideration for their stock, which collectively amount to but ten shares; and having accomplished the cancellation of these documents; to recover from the defendant the sum of ninety thousand dollars, which it is alleged the defendant has defrauded the public out of. In view of these objects to be attained by this action it would seem to have been an essential averment that there were stockholders of the corporation other than the defendant and the few nominal incorporators thereof who are alleged to have no interest therein; yet this fifth amended complaint contains no averment that there are any such stockholders save the inferential allegation that the defendant used the corporation as a "tool and catspaw" of himself and a fellow-conspirator, and as a "means and instrumentality of defrauding and swindling the public, by which process he wrongfully and fraudulently received from the Consolidated Concessions Company about ninety thousand dollars paid into said company by the public as the proceeds of plaintiff's stock." It is clear that these averments are altogether insufficient to base a right of action for the recovery of money upon. If, as alleged, this corporation was the "tool and catspaw" of the defendant and his fellow-conspirators, there is nothing to show that it is not still such, or that being *particeps criminis* in the alleged fictitious and fraudulent transactions it has any right of action to set aside such transactions or recover moneys, unless so to do would redound to the benefit of *bona fide* stockholders of the corporation, who are the real parties in interest and the only persons defrauded by the defendant's alleged wrongful acts.

It was essential, therefore, to have alleged that there were such persons, and who they were, and what their interest in the corporation amounted to, and in what specific way and to what extent they were injured by the acts and proceedings complained of. Such averments are altogether lacking from this complaint.

It was the existence of these and a number of other defects in this fifth amended complaint which caused the court to properly sustain the general and special demurrer to it.

[4] The main contention of the plaintiff on this appeal appears to be that the trial court sustained said demurrer without leave to amend. Had this been a demurrer to the original complaint, there might be some reason or force to this contention, but there is a limit to which the patience of the trial court may be extended in the matter of allowing repeated attempts to amend a faulty pleading. This was pointed out in the case of *Billesbach v. Larkey*, 161 Cal. 649, [120 Pac. 31], wherein the supreme court, in affirming a judgment rendered after a third ineffectual attempt to amend a complaint, said: "Ordinarily the trial court should be liberal in allowing amendments where the defect in the complaint is one of form only. This, however, is a matter which is almost entirely within the discretion of the court, and this court can reverse the case only where there is a manifest abuse of discretion in giving final judgment on demurrer without leave to amend. The plaintiff does not have a positive right to amend his pleading after a demurrer has been sustained to it; his leave to amend afterward is always of grace, not of right. In the present case the final pleading of plaintiffs was the third amended complaint. It was therefore their fourth attempt to state a cause of action. The refusal of leave to amend was not an abuse of discretion."

We do not deem it necessary to pursue the subject further. Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2630. First Appellate District, Division One.—March 26, 1919.]

H. R. WHITE, Appellant, v. E. O. THOMPSON et al.,
Respondents.

- [1] **ACCOUNT STATED—IMPEACHMENT FOR FRAUD OR MISTAKE.**—While a suit to open, surcharge, or falsify an account is one proper for equitable jurisdiction, yet the rule seems to be established that a stated account need not be impeached by a direct suit brought for that purpose, but may be impeached for fraud or mistake either at law or in equity whenever it is brought forward as a defense or cause of action.
- [2] **ID.—OMITTED ITEMS — MISTAKE — ASSUMPSIT.**—An action in *assumpsit* will lie to recover for items of indebtedness omitted by mistake on a settlement of an account, if there is no other objection.
- [3] **ID.—WHEN NOT BAR TO RECOVERY.**—An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made, nor for those omitted by mistake, nor for such as were left open for further consideration.
- [4] **ID.—FINAL SETTLEMENT—PRESUMPTION NOT CONCLUSIVE.**—Parties to an account stated, signed by them, are not concluded by the presumption that it was a final settlement of all valid debts, debits, and credits, as to matters which were not contemplated by them, or which were not included in the settlement, though they existed at the time.
- [5] **ID.—DISCOVERY OF MISTAKE — ADJUSTMENT OF ACCOUNT.**—Where an account has been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake may be corrected and the rights of the parties readjusted as to such mistake.
- [6] **ID.—ASSUMPSIT—EVIDENCE.**—In an action in *assumpsit* to recover an item of indebtedness which was entirely omitted in negotiations leading to an account stated, the court may properly allow evidence of the details of the transactions between the parties.
- [7] **ID.—ASSIGNMENT.**—Such a cause of action in *assumpsit* to recover an item of indebtedness which was omitted from the negotiations of the parties leading to the settlement of the account between them, is assignable.
- [8] **ID.—PAYMENT—BURDEN OF PROOF.**—In such an action, the burden of proof of payment is on the defendants.

APPEAL from a judgment of the Superior Court of Fresno County. D. A. Cashin, Judge. Reversed.

The facts are stated in the opinion of the court.

Morrison, Dunne & Brobeck and H. B. Dormans for Appellant.

Everts & Ewing and W. E. Simpson for Respondents.

WASTE, P. J.—Plaintiff appeals from the judgment of nonsuit and dismissal.

From the bill of exceptions the following facts appear: The defendants, copartners, on or about June 20, 1915, ordered from the Santa Cruz Portland Cement Company a carload of cement of the value of \$820.70, which is the subject matter of the action, and agreed to pay for the same within a reasonable time after it was delivered to them. The Cement Company shipped the cement to the defendants at Visalia, as the consignees. On the 28th of June of the same year defendants wrote to the Cement Company, stating that they had delivered the cement to W. H. Worswick, Jr., and requested the Cement Company to give the defendants credit for the sale price of the cement and forward the invoice covering it to said Worswick at Visalia. Believing that an arrangement had been made between Worswick and the defendants, whereby Worswick had agreed to pay for the cement, and induced by this belief, the Cement Company gave Thompson Brothers credit for the cement and the charge was then made by it against Worswick for the amount, which appears to have been his initial account with the company.

Some months later the defendants and the Cement Company had an accounting with each other, from which it appeared that there was a balance due to the defendants from the Cement Company, in the sum of \$412.57. At the request of defendants this credit balance on the books of the company was transferred to the credit of other parties, and the account was considered settled. Shortly thereafter, the Cement Company learned for the first time that the defendants had merely loaned the cement in question to Worswick, and that it had all been returned by him to the defendants, and that there had never been any agreement between defendants and Worswick for the payment by him to the company.

Immediately upon ascertaining these facts, the Cement Company canceled the credit theretofore entered on its books

in favor of the defendants, likewise canceled the charge it had entered against Worswick, and re-entered the amount of \$820.70 on its account against the defendants. After attempting to collect the amount, which defendants refused to pay, the Cement Company assigned, and set over, to the plaintiff the account, and plaintiff instituted this action. The complaint is in five counts, the first four being common counts, and the fifth setting out the facts, substantially as they appear from the evidence. At the conclusion of plaintiff's case, from which the foregoing facts appeared, the court granted defendants' motion for a nonsuit, and plaintiff appeals. The action of the trial court in sustaining defendants' motion for a nonsuit is the sole assignment of error on appeal.

The action of the trial court in granting the nonsuit appears to have been based upon the contention of the defendants at the trial, the respondents here, that the evidence showed an account stated between the Cement Company and defendants existing on and after October 20, 1915; that said account having been based on cross-items and settled by payment, it could be reopened and corrected only by an equitable action to surcharge, falsify, or correct the account; and on the further ground that any claim based upon such an account stated was not assignable. It appears to us that the action at bar is merely a legal action in *assumpsit* to recover an item of indebtedness owing from defendants to plaintiff's assignor, which was entirely omitted in the negotiation leading to the account stated.

[1] "While a suit to open, surcharge or falsify an account is one proper for equitable jurisdiction, yet the rule seems to be established that a stated account need not be impeached by a direct suit brought for that purpose. It may be impeached for fraud or mistake either at law or in equity whenever it is brought forward as a defense or cause of action." (1 Corpus Juris, 715.)

[2] An action in *assumpsit* will lie to recover for items of indebtedness omitted by mistake on a settlement of an account, if there is no other objection. (*Sage v. Hawley*, 16 Conn. 106, [41 Am. Dec. 128]; *Perkins v. Hart*, 11 Wheat. (U. S.) 237 [6 L. Ed. 463, see, also, *Rose's U. S. Notes*]; *Harman & Crockett v. Maddy Bros.*, 57 W. Va. 66, [49 S. E. 1009].)

[3] An account stated does not bar a recovery for items not within the contemplation of the parties when the settle-

ment was made. (*Clarke v. Kelsey*, 41 Neb. 766, [60 N. W. 138]; *Lawler v. Jennings*, 18 Utah, 35, [55 Pac. 60]); nor for those omitted by mistake; nor for such as were left open for further consideration. (*Waldron v. Evans*, 1 Dak. 11, [46 N. W. 607].) [4] Parties to an account stated, signed by them, are not concluded by the presumption that it was a final settlement of all valid debts, debits, and credits, as to matters which were not contemplated by them, or which were not included in the settlement, though they existed at the time. (*Treacy v. Powers*, 112 Minn. 226, [127 N. W. 936].) [5] Where an account has been adjusted by the parties, if any mistake is subsequently discovered, the whole account need not be opened and readjusted, but the mistake may be corrected and the rights of the parties readjusted as to such mistake. (*Carpenter v. Kent*, 101 N. Y. 591, [5 N. E. 787].)

[6] The action of the trial court, in admitting evidence of the details of the transaction between the Cement Company and defendants, was proper. In such actions, the court may allow evidence of omissions and errors therein and find in accordance with the developed facts. (*Adams v. Gerig*, 25 Cal. App. 638, [145 Pac. 106], and cases cited; see, also, *McLelland v. East San Mateo Land Co.*, 166 Cal. 736, [137 Pac. 1145].)

[7] Respondent takes the ground that the case at bar is a suit to surcharge, falsify, and correct an account stated, and that a cause of action for fraud is not assignable. As we view the action, it is rather one in *assumpsit* to recover on an existing obligation, which was omitted from the negotiations of the parties leading to the settlement of the account, and which remained an existing legal obligation, upon which the parties had an assignable cause of action.

The assignment by the Cement Company to plaintiff was of its account with, and claim, and cause of action in the sum of \$820.70 against defendants. The claim of the Cement Company against the defendants was the legal right to collect, and reduce to possession, its claim for \$820.70. This was a property right which had an existing value. By reason of the assignment, therefore, plaintiff acquired a substantial thing in action arising out of the obligation resting on the defendants to pay the Cement Company the amount due thereon, and one capable of being transferred by the owner. (Civ. Code, sec. 954.)

[8] Respondent makes the point on appeal that it does not appear from the evidence that the amount sued for was not paid to the assignee, the only proof being the testimony of the auditor of the Cement Company: "Our books show that there is still due, owing and unpaid by Thompson Brothers the sum of \$820.70 on the two cars referred to." The plaintiff was not required to prove negative allegations. The burden of proof of payment was on the defendants. (*Melone v. Ruffino*, 129 Cal. 514, [79 Am. St. Rep. 127, 62 Pac. 93].)

The defendants' motion for nonsuit and dismissal should have been overruled. The judgment is reversed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 22, 1919.

All the Justices concurred.

[Civ. No. 1933. Third Appellate District.—March 27, 1919.]

SUTTER BUTTE CANAL COMPANY (a Corporation),
Appellant, v. **RICHVALE LAND COMPANY** (a Corporation),
Defendant; **W. H. BRADLEY et al.**,
Respondents.

[1] **ACTION ON CONTRACT—FINDING—EVIDENCE.**—In this action brought to recover a stated sum for water alleged to have been furnished to one of the defendants under a written contract, there was substantial evidence in support of the finding of the court that the plaintiff did not deliver the water in accordance with its contract.

[2] **VENDOR AND VENDEE—RESERVATION OF RIGHT OF WAY—CONSENT TO BY VENDEES—INTENT.**—Where an instrument executed and recorded by the owner of a tract of land purporting to reserve to "its assigns and successors" a right of way for canals and ditches necessary for irrigation is incorporated by reference in a subsequent agreement of sale covering a portion of the tract, and in such agreement the vendees recognize and consent to said "reservation," in an action by such vendees to recover compensation for land appropriated for such right of way, the court is not justified

in resorting to technical refinement as to the meaning of "reservations" to defeat the manifest intent of the parties to exclude such right of way from the operation of the deed to be executed pursuant to such agreement of sale.

- [3] **ID.—PURCHASE SUBJECT TO RESERVATIONS—ESTOPPEL.**—Where such vendees agree that their deed shall be subject to such a reservation of a right of way, for canals and ditches, and, acting upon that agreement, a third person and the vendor enter into a contract under which such canals and ditches are made without any objection from said vendees, the latter will be estopped from claiming that said stipulation and reservation is void.
- [4] **ID.—RESERVATIONS IN FAVOR OF STRANGER—EFFECT OF.**—An attempted reservation or exception in a conveyance in favor of a stranger, although not conferring title, may sometimes operate as an admission in his favor, or as an estoppel against the grantor.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge. **Reversed.**

Henry Ingram and W. H. Carlin for Appellant.

Samuel J. Nunn for Respondents.

BURNETT, J.—The action was brought to recover \$129 for water alleged to have been furnished to the Richvale Land Company under a certain contract, which is set out in the complaint and which makes the charge a lien upon the land to be irrigated. The real property involved consists of lot No. 35, and the east half of lot No. 36 of Richvale Colony, No. 1, in Butte County, the legal title to which was and is in said Land Company, although prior to the execution of said contract for water Bradley and Ralls had entered into an agreement with the Richvale Land Company for the purchase of the land, and they were actually in the possession and use of it during the year 1914, the period with which we are herein concerned. At the beginning of the trial, the Richvale Land Company withdrew, and the trial was had on the complaint and answer and the cross-complaint of Bradley and Ralls and answer thereto by plaintiff. The cross-complaint denied that plaintiff had furnished the water as agreed, and cross-complainants set up a claim for damages to their crop of rice because of the failure to deliver the water in time, also a claim for compensation for 4.18 acres of land alleged to have been taken by plaintiff in constructing ditches and roads. The

court found that plaintiff had failed to deliver the water according to its contract, thereby damaging cross-complainants to the extent of \$277.90 and had appropriated 3.13 acres of the land for which Bradley and Ralls were allowed the sum of \$250.40.

It is conceded that the vital questions presented on this appeal are two, as follows: "Did plaintiff deliver the water in the year 1914 in accordance with its contract?" and "Were defendants, Bradley and Ralls, entitled to judgment for the 3.13 acres of land in question?"

[1] As to the first of these, we think plaintiff is in error in the claim that there is no substantial evidence in support of the adverse finding of the court. It appears that plaintiff was to furnish 95 second-feet of water for the irrigation of some 5,066 acres of land altogether, including the lots in controversy, and Mr. Charles T. Tulloch, superintendent and manager of plaintiff, testified positively that the requisite amount was furnished.

It also appears without question that the amount agreed upon was amply sufficient for the purposes of all the land owners. It may be stated further that no witness for respondents attempted to specify the number of second-feet that was actually furnished, but several of them related facts from which the conclusion would follow that there was a material omission to comply with the requirement of the contract. It seems unnecessary to recite the testimony or to comment upon it further than to say that the declaration of the witnesses that there was a "shortage" in the supply could be understood to mean, under the circumstances detailed by the witnesses, only that the amount furnished was less than what was promised. The term itself, in a sense, represented the opinion of the witness, but no objection was made on that ground, and we cannot say that the lower court attributed to it a greater significance than it deserved. The other question we regard as of more serious moment.

There is no controversy as to the extent of the land that is embraced in the ditches and roads used by plaintiff for its irrigating system or as to its value, but it is claimed by appellant that this is not the proper subject of counterclaim or cross-complaint, and, furthermore, that appellant obtained a right of way for these roads and ditches by virtue of certain instruments set out in the record.

This latter contention will first receive our attention. The original instrument was executed by the Richvale Land Company on September 20, 1909, and it was recorded in the county recorder's office in Book "H" of Miscellaneous Records. Said document was termed: "Stipulation, Richvale Colony #1." Among other things it recited: "The said Richvale Land Company intends selling the said colony in tracts to various purchasers, Now, therefore, it is stipulated that in all such sales the said Richvale Land Company reserves to itself and assigns the right of way over the following property to be used as roads by the general public and the right to enter upon, open and grade said roads. The property so reserved is a part of said Richvale Colony number one and is particularly described as follows, to wit," said description including the lots in controversy. Said "stipulation" proceeds: "And, it is still further stipulated that in all such sales Richvale Land Company reserves to its assigns and successors a right of way in, to and across said colony number one and all portions thereof for the purpose of constructing and maintaining and operating (free of cost) irrigation and drainage ditches and to flow water therein, however, not unnecessarily to the detriment of purchasers of property." We may state that there is no controversy as to the road, and it will, therefore, be eliminated from further consideration. Nor is there any claim that any of the ditches, which were constructed, was or is "unnecessarily detrimental" to anyone. Then comes the subsequent agreement of sale with respondents of November 8, 1909, covering said lot No. 35 and the east one-half of lot No. 36 and containing the covenant: "It is agreed by and between the parties hereto that on the performance of all the stipulations, covenants and provisions herein on the part of the purchaser the Company will execute and deliver to the purchaser, his heirs or assigns, a good and sufficient deed conveying title to the land contracted to be conveyed upon the conditions, however, that the contract and deed made hereunder shall be subject to the terms, provisions, reservations, stipulations, etc., set out and contained or referred to in a certain instrument, dated the 20th day of September, 1909, and recorded the same day in the office of the County Recorder of said Butte County in Book 'H' of Miscellaneous Records at pages 409 and 410. The purchaser hereby assents to the said terms, provisions, reservations, stipulations, etc., in said in-

strument contained." Then follows the agreement of June 30, 1911, between appellant and the Richvale Land Company providing that appellant will furnish water for these very premises, and binding the party of the first part (appellant) to construct and complete for the second party (Richvale Land Company) "on or before the thirtieth day of December, 1911, all lateral ditches, weirs, gates and structures necessary in its judgment for the delivery of water to said land." The agreement further provides that the Richvale Land Company would "supply all necessary rights of way therefor and install service gates" and maintain the ditches, weirs, etc., and would pay the party of the first part the sum of \$13.50 per acre for the construction of said canals and ditches. In accordance with the terms of this contract, said structures were completed by appellant, there being apparently no controversy as to their proper location. The case thus stands for appellant apparently as follows: The undisputed owner of the land by a solemn instrument of record declares the purpose and intention to reserve from the operation of any future sale a right of way for canals and ditches necessary for irrigation. Thereafter an agreement of sale for a portion of said land is executed, in which the vendees recognize and consent to said "reservation." This transaction is followed by an agreement between the said owner and appellant whereby the former grants to the latter a right of way for said purpose, which is accepted and its location agreed upon and the structures completed. Assuming that each step as thus detailed is legally what it purports to be, of course, no one would contend that said vendees could successfully urge a claim against appellant for compensation for the land used for said right of way. But the point is made that the attempted "reservation" for the right of way for said ditches, in said instrument of September 20, 1909, is entirely void, for the reason that it is in favor of a third party, and, also, because said third party is not designated and identified. The "reservation," it is to be remembered, does not read "Richvale Land Company reserves to itself, its assigns and successors," as is usual in such cases, but the provision is "Richvale Land Company reserves to its assigns and successors," etc.

In *Eldridge v. See Yup*, 17 Cal. 52, it was held that such a covenant or reservation would be void, the court saying: "A person who is not a party to a deed cannot take anything by

it unless it be by way of remainder. The grantor cannot covenant with a stranger to the deed." However, it is sometimes the case that what is called a "reservation" is treated as an "exception" and effect given to it, although, under the established rules of interpretation, it is inoperative as a "reservation." (*Martin v. Cook*, 102 Mich. 267, [60 N. W. 679]; *Burchard v. Walther*, 58 Neb. 539, [78 N. W. 1061]; *Bridger v. Pierson*, 45 N. Y. 601; *Redding v. Vogt*, 140 N. C. 562, [6 Ann. Cas. 312, 53 S. E. 337].) This is in line with the recognized policy of the law to give effect, as far as possible, to the intention and purpose of the parties to an instrument.

[2] But, it is apparent herein that the said provision in the instrument of September 20, 1909, strictly speaking, constitutes neither a "reservation" nor an "exception." This follows from the fact that the instrument was not a conveyance nor an agreement for the conveyance of any property, nor did it purport to be such an instrument. However, it was written evidence of the purpose of the owner to withhold from the operation of the deed to any future purchaser of said land or any portion thereof a right of way for said ditches and canals. Whether the recording of said instrument would constitute notice of such intent we need not consider, since there is no dispute herein as to *actual* knowledge of that instrument. Moreover, as we have seen, respondents expressly agreed to be bound by the terms of that instrument. Their title rests upon said executory agreement of November 8, 1909. We must scan its terms to ascertain the intent of the parties. The vendor therein agreed to convey to the vendees a good and sufficient deed, subject, however, "to the terms, provisions, reservations, stipulations," etc., of said instrument of September 20, 1909. In other words, reading the stipulation of the earlier instrument as thus incorporated in said agreement of sale, we find that the Richvale Land Company, upon the consideration of certain payments by respondents, "agrees to sell and convey unto the purchaser and the purchaser agrees to buy . . . the following real estate . . . subject to the following stipulation that in such sale Richvale Land Company reserves to its assigns and successors a right of way in, to, and across said Colony Number One and all portions thereof," etc. No one could doubt from this language that it was the intention of the parties to except from the operation of the deed, a right of way for said purpose, and a court is not justified in

resorting to technical refinement as to the meaning of "reservations" to defeat the manifest intent of the parties to exclude this right of way.

[3] Again, it is too late for respondents to urge successfully that the language used does not measure up to the definition of a reservation. They deliberately agreed that their deed should be subject to such reservation, and, acting upon that agreement, appellant and the Richvale Land Company entered into their contract under which the improvements were made without any objection, we may assume, from respondents, and they should now be estopped from claiming that said stipulation and reservation is void. [4] That an attempted reservation or exception in a conveyance in favor of a stranger, although not conferring title, may sometimes operate as an admission in his favor, or as an estoppel against the grantor, is supported by the authorities. (*Butler v. Gosling*, 130 Cal. 422, [62 Pac. 596].) The same principle would apply to the vendee in a case like this, where he has agreed to the reservation.

As indicated above, there is no question before us as to the authority of the Richvale Land Company to locate the right of way. Where a dispute does arise in such cases, however, the rule to be applied is thoroughly considered in *Brown v. Ratliff*, 21 Cal. App. 282, [131 Pac. 769], and *Ballard v. Titus*, 157 Cal. 673, [110 Pac. 118]. If we are right in the foregoing, the other point suggested by appellant becomes unimportant and we need not consider it.

We think the trial judge was in error in allowing cross-complainants compensation for the land appropriated for said right of way, and for that reason the judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2642, First Appellate District, Division One.—March 27, 1919.]

W. T. DAVIS, Respondent, v. A. A. BLASINGAME, Appellant.

[1] **ANIMALS—ESTRAYS—COMMON-LAW RULE—APPLICATION TO FRESNO COUNTY—LIMITATION OF ACTIONS.**—The rule of the common law which required every man to keep his beasts within his own close is in full force and effect in its application to pastoral lands in the county of Fresno; and an action for the recovery of damages for the trespass of stock upon such uninclosed lands is not limited as to its time of commencement to sixty days after the commission of the act of trespass complained of.

APPEAL from a judgment of the Superior Court of Fresno County. D. A. Cashin, Judge. Affirmed.

The facts are stated in the opinion of the court.

D. T. Winne and C. K. Bonestell for Appellant.

Geo. Cosgrave for Respondent.

RICHARDS, J.—This is an appeal from a judgment in plaintiff's favor in an action for damages for the alleged trespass of the defendant's cattle upon the lands of the plaintiff and another, and the consequent depasturing of the same. The complaint contains two causes of action, one relating to the depasturing of the plaintiff's own lands, and one relating to the depasturing of the lands of another who assigned his cause of action to the plaintiff. The defense consists in a denial of the allegations of both counts of the complaint. The evidence educed upon the trial showed that the parties to the action were neighbors living in the eastern foothills of Fresno County, and owning tracts of land of considerable acreage in propinquity to each other. With the exception of about three hundred acres, the lands of the plaintiff and his assignor were uninclosed, and the defendant pastured his stock repeatedly upon these uninclosed lands after warning to desist from so doing. The trial court rendered judgment in the plaintiff's favor for the damages in the sum of \$1,003.35, with costs of suit.

The only two points urged by the appellant upon this appeal are, first, that no recovery can be had for the depasturing of land in Fresno County unless the land is fenced, and, second, that even if such an action is maintainable it must be commenced within sixty days after the commission of the trespass. The determination of these points requires an inquiry into the state of the statutory law, and the decisions construing the same, in relation to fences upon pastoral lands in the county of Fresno. This inquiry may well begin with the case of *Blevins v. Mullally*, 22 Cal. App. 519, [135 Pac. 307], in which Mr. Justice Hart, after a very thorough review of the statutes and cases bearing upon the subject, holds that the rule of the common law which required every man to keep his beasts within his own close, was abrogated by the legislature of this state in 1850 (Stats. 1850, pp. 131, 214), and was for a time thereafter not in force in any of the counties of the state of California, but that commencing in the year 1863 the rule of the common law began to be restored to operation by special acts in that and later years, applying to an increasing number of the counties of the state as conditions changed therein from a pastoral to an agricultural or horticultural state. The first county to be thus affected was the county of Santa Clara (Stats. 1863, p. 581, as amended by Stats. 1871-72, p. 580). In the case of *Hahn v. Garratt*, 69 Cal. 146, [10 Pac. 329], these acts were held to intend that an owner of land in the county of Santa Clara was no longer required to fence it against cattle belonging to another person, but could maintain an action for damages against the owner of cattle permitting them to trespass upon such uninclosed land. In the year 1874 the legislature passed an act (Stats. 1873-74, p. 50) entitled, "An act to protect agriculture and to prevent the trespassing of animals upon private property in the counties of Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo and Monterey." The act provides that the owner or occupant of lands in the designated counties, whether such lands be inclosed or not, should have the right to take up and impound stock found upon such lands, and proceed to sell such stock for the damages occasioned by their trespass. Section 8 of the act gave to such owner or occupant of such lands the right to maintain an action for the trespass in any court of competent jurisdiction without exercising his right of impounding such stock, provided such action was com-

menced within sixty days. In the case of *Triscony v. Brandenstein*, 66 Cal. 514, [6 Pac. 384], the supreme court had occasion to construe and apply this statute to a case of trespassing cattle upon unfenced lands in the county of Monterey, and the court there held that a cause of action existed for such trespass in that county in addition to the remedy of the proceeding *in rem* provided for in that statute, and that the plaintiff in that action was not restricted to the period of sixty days within which to bring his action.

In the case of *Heilbron v. Heinlen*, 70 Cal. 482, [12 Pac. 385], which was an action for the trespassing of stock upon unfenced land in Fresno County, the supreme court sustained such action upon the authority of *Triscony v. Brandenstein*, *supra*, holding that the plaintiff was not confined in his proofs to the trespasses committed by the defendant's cattle within sixty days prior to the commencement of his action. A similar ruling was made in the case of *Zumwalt v. Dickey*, 92 Cal. 156, [28 Pac. 212], an action arising in the county of Tulare.

In the year 1878 the legislature passed an act entitled, "An act concerning the trespassing of animals upon private lands in certain counties of the state of California." By the terms of this act it was declared to be unlawful for any animals, the property of another person, to enter upon any land owned or lawfully in the possession of another than the owner of such animal. The act as at first passed was made applicable to the county of Colusa and certain other counties of the state, not including Fresno, Monterey, or Tulare, and was later in the same session amended so as to apply to the county of Los Angeles. (Stats. 1877-78, pp. 176, 878.) It was this act which was under review in the case of *Blevins v. Mullally*, 22 Cal. App. 519, [135 Pac. 307], and which was further considered in its application to the county of Los Angeles in the case of *Hicks v. Butterworth*, 30 Cal. App. 564, [159 Pac. 224]. In each of these cases last above cited an important question applicable to the case at bar arose. This was the question as to the effect upon the statute of 1877-78, and necessarily also upon the statute of 1873-74, of the act of the legislature passed in 1907, entitled "An act concerning trespassing animals upon private lands and the recovery of damages resulting therefrom." [Stats. 1907, p. 999.] By the terms of this latter act it was made unlawful for any person owning or in possession of an animal to suffer or permit such

animal to break in or enter upon any land of another person where such land is planted to growing crops, vines, fruit trees or vegetables, "and is at the time entirely inclosed by a substantial fence or other inclosure." The act provides that "All acts and parts of acts in conflict with this act are hereby repealed." The question discussed by the district courts of the second and third districts in the two cases last above cited was as to the effect of this act upon the act of 1877-78, and, inferentially, also upon the act of 1873-74. In both of these cases the conclusion was arrived at that the act of 1907 did not operate to repeal the act of 1877-78, or any other of the special acts declaring the common-law rule as to trespassing stock upon uninclosed lands to be in force in the counties designated therein, but only to limit the application of such rule to lands other than those specially required to be inclosed under the terms of the latter enactment. In each of the foregoing cases a petition for rehearing before the supreme court was denied.

[1] The law as thus stabilized by the line of authorities above set forth would seem to be that the rule of the common law regarding the keeping of stock within its owner's close is in full force and effect in its application to pastoral lands in the county of Fresno, and that an action for the recovery of damages for the trespass of stock upon such uninclosed lands is not limited as to its time of commencement to sixty days after the act of trespass complained of. It follows that neither of the two points urged by the appellant herein has sufficient merit to justify a reversal of the case. It may be stated that nothing which was said in the case of *Montezuma Improvement Co. v. Simmerly*, 28 Cal. App. Dec. 418, decided by the second division of this court, is to be taken as contrary to the views herein expressed, that case having application to the county of Mendocino, in which the common-law rule as to trespass has never been in force.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 26, 1919.

All the Justices concurred.

[Civ. No. 2964. Second Appellate District, Division One.—March 27, 1919.]

CURTIS C. COLYEAR, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

- [1] **PROCEEDINGS SUPPLEMENTARY TO EXECUTION—THIRD PARTY CLAIM—UNWARRANTED ORDER.**—In a proceeding supplementary to execution, an order directing a third person who was not a party to the action but who has possession of goods belonging to the judgment debtor to deliver such goods to the judgment creditor, is wholly unwarranted where such party claims an interest in the goods.
- [2] **ID.—WAREHOUSEMAN'S LIEN—ADVERSE CLAIM.**—One who claims a warehouseman's lien on property claims an interest in such property adverse to the owner.
- [3] **ID.—DETERMINATION OF RIGHTS OF PARTIES—PROCEDURE.**—A person claiming property adverse to a judgment debtor is entitled to his day in court, with an opportunity for the determination of his rights in an ordinary action, as specified in section 720 of the Code of Civil Procedure, which provides that, in a proceeding supplementary to execution, if it appears that a person having property of the judgment debtor claims an interest therein adverse to such judgment debtor, the judgment creditor may maintain an action against such person for the recovery thereof; and the court may by order forbid a disposition or transfer of the property until an action can be commenced and prosecuted to judgment.
- [4] **ID.—ORDER IN EXCESS OF JURISDICTION—VIOLATION—CONTEMPT.**—Where, in a proceeding supplementary to execution, the court makes an order directing a third person to turn over to the judgment creditor property of the judgment debtor in which said third person claims an interest adverse to said judgment debtor, it acts in excess of its jurisdiction, and the violation of such order by said third person constitutes no warrant for adjudging such third person guilty of contempt and imposing punishment therefor.

PROCEEDING in prohibition to prevent the Superior Court of Los Angeles County and Grant Jackson, Judge thereof, from adjudging petitioner guilty of contempt for violation of an order issued in a proceeding supplementary to execution. Writ granted.

The facts are stated in the opinion of the court.

Henry O. Wackerbarth for Petitioner.

Mabel Walker Willebrandt for Respondents.

SHAW, J.—Prohibition. As appears from the verified petition, to which respondent has interposed a general demurrer and an answer, A. H. Mitchell, then in the possession of certain household furniture and furnishings, did, on September 4, 1918, deliver the same to petitioner who, as a warehouseman, received the same on storage for hire and issued a non-negotiable warehouse receipt therefor. Thereafter the sheriff of Los Angeles County, under and by virtue of an execution issued upon a judgment rendered by the superior court of Los Angeles County in an action to which petitioner was not a party, brought therein by Harry Perkins against A. H. Mitchell for the possession of the goods, made demand upon petitioner for the delivery of the same to him, with which demand petitioner refused to comply, unless he produced an order therefor from Mitchell and paid the storage charges. Thereupon an order was issued in said action by respondent, copy of which was duly served upon petitioner, requiring him to appear in said court to answer concerning said property. Upon the appearance of petitioner in response to said order, a hearing was had wherein an order was made as follows: "Harry Perkins vs. A. H. Mitchell. In the matter of the order for appearance of A. H. Mitchell, judgment debtor, and the order for Colyear Van & Storage Company to appear and answer concerning property, which comes on now to be heard, F. Horowitz and Mabel W. Willebrandt appearing as attorneys for the plaintiff and H. O. Wackerbarth appearing for the defendant, it appearing that Colyear Van & Storage Company has the property described in the complaint, and is holding the same as the agent of defendant, it is ordered that said Colyear Van & Storage Company deliver said property to the plaintiff within 10 days." Petitioner, claiming an interest in the property, refuses to comply with the order, by reason whereof respondent threatens to and will, unless prohibited by this court, adjudge petitioner guilty of contempt and commit him to jail as punishment therefor.

[1] Petitioner was not a party to the action of Perkins v. Mitchell, and the order made requiring him to deliver to plaintiff therein the goods in which he claimed an interest was

wholly unwarranted. Counsel for respondent insists, however, that petitioner, though not a party to the action, if aggrieved by the order made, has a right to appeal therefrom, and since an appeal will afford him a plain, speedy, and adequate remedy in the ordinary course of law, prohibition will not lie. Conceding, but not holding, this to be true, a sufficient answer thereto is that petitioner is not seeking a review of the order, but seeks to have the court prohibited from making an order based thereon, which the court threatens to and will make, adjudging him guilty of contempt and committing him to jail for refusing to comply therewith, from which, if made, no appeal lies.

The order made was in a proceeding supplementary to execution, as provided by chapter II (of title IX of part II) of the Code of Civil Procedure. Section 717 provides that after a return of an execution against property of the judgment debtor and upon proof that any person has property of such judgment debtor, the judge may by order require such person to appear and answer concerning the same. It was under this provision of law that petitioner was required to appear and answer concerning the property. Section 719 provides that the judge upon such hearing may order any property belonging to the judgment debtor, which is in the hands of any other person, to be applied toward the satisfaction of the judgment, but with this express proviso: "But no such order can be made as to . . . property in the hands of any other person, . . . if such person claims an interest in the property adverse to the judgment debtor." [2] It is perfectly clear that petitioner claimed an interest in the property adverse to Mitchell by virtue of his lien thereon as a warehouseman for the storage of the property consigned to him by one who, in so far as this record shows, was at the time of the consignment in the lawful possession thereof. [3] The law does not authorize the trial of the rights of a third party claiming property adverse to a judgment debtor in this summary manner. He is entitled to his day in court, with an opportunity for the determination of his rights in an ordinary action, as specified in section 720 of the Code of Civil Procedure, which provides that if it appears that a person having property of the judgment debtor in any case claims an interest therein adverse to such judgment debtor, the judgment creditor may maintain an action against such person for the recovery thereof; and the

court may by order forbid a disposition or transfer of the property until an action can be commenced and prosecuted to judgment.

[4] The court acted in excess of its jurisdiction in making the order requiring petitioner to deliver possession of the property to plaintiff in said action. (*McDowell v. Bell*, 86 Cal. 615, [25 Pac. 128]; *High v. Bank of Commerce*, 103 Cal. 525, [37 Pac. 508]; *Lewis v. Chamberlain*, 108 Cal. 525, [41 Pac. 413].) Hence it follows that the violation of such order constitutes no warrant for adjudging petitioner guilty of contempt and imposing punishment therefor.

It is therefore ordered that respondent desist and refrain from any proceeding having for its purpose the enforcing of that certain order made by the superior court of Los Angeles County on March 6, 1919, in the case of *Harry Perkins v. A. H. Mitchell*.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2945. Second Appellate District, Division One.—March 27, 1919.]

CALIFORNIA HIGHWAY COMMISSION, etc., Petitioner,
v. INDUSTRIAL ACCIDENT COMMISSION et al.,
Respondents.

[1] **WORKMEN'S COMPENSATION ACT — PROSPECTIVE EMPLOYMENT — INJURY BEFORE ACCEPTANCE OF PROFFERED SERVICES — RELATION OF PARTIES.**—A finding of the Industrial Accident Commission that a certain person was an employee of the California Highway Commission at the time he was injured and that the injury arose out of and in the course of his employment as such employee, is not supported by the evidence, when the uncontroverted facts show that such person was injured while on his way to the place of prospective employment where he was to offer his services to the foreman in charge, who was the only person who had the right to employ labor, and that at the time of the injury he had not yet reported to such foreman and there had been no word or act on the part of such foreman manifesting an acceptance of his proffered service.

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[2] ID.—PROVIDING OF MEANS OF CONVEYANCE—IMMATERIAL FACTOR—

The fact that such injured person, instead of providing his own means of conveyance and cost of transportation, availed himself of the proffered offer of the California Highway Commission to advance the cost thereof is an immaterial factor in the consideration of the question as to whether the relation of employer and employee existed.

PROCEEDING in Certiorari to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Daniel W. Burbank and F. J. Creede for Petitioner.

Christopher M. Bradley for Respondents.

SHAW, J.—Upon a writ of review issued herein we are asked to annul an award of compensation made by the Industrial Accident Commission against the California Highway Commission and in favor of dependents of George J. McGillivray, deceased, who is alleged to have died as the result of injuries received while in the employ of the Highway Commission.

The facts are as follows: In May, 1918, petitioner was engaged in constructing highways some distance from the city of Los Angeles, where the office of its division superintendent, whose duties were the general supervision of the work in his division, was located. Each section or job of work was in charge of a superintendent or foreman on the ground. In the month of May the Public Employment Bureau of Los Angeles having received notice from the division superintendent's office that petitioner was in need of laborers, sent George J. McGillivray to the office of said superintendent, where he applied for work as a teamster, and was told by Mr. Swartz, then in charge of the office, that he could secure a job by applying to Mr. J. G. Beckjord, the foreman on the ground of what was known as the Ridge Route, distant some sixty miles from Los Angeles, provided he was satisfactory to him. He was also informed as to compensation paid and the amount deducted therefrom as board for employees, who were required to furnish their own blankets, and told that transportation to the place would be furnished him, no charge for

which would be made, provided he held his job for one month. For the purpose of conveying deceased and another to the work, the Highway Commission secured an automobile, the owner of which undertook, for hire, the transportation of the men to the place where they, if acceptable to the foreman, would be employed. On the way to the prospective work the automobile overturned, injuring McGillivray, as a result of which he died. In the employment of men for the work Swartz had no authority other than, when men were needed and finding those whom he thought would be acceptable to the foreman, to send them on to the work, telling them, as he did McGillivray, that they could secure a job provided they were satisfactory to the foreman; that as to men thus sent to him the foreman was vested with full authority, as in cases of independent application, to employ them or not, as he might determine. Indeed, as conclusively shown by the evidence, the only person who had the right to employ labor upon the work was the foreman in charge, who frequently refused to accept men sent to him by the office, and that nothing was paid for time consumed in going from Los Angeles to the place of prospective employment.

[1] Upon these facts, as to which there is no controversy, a majority of the commissioners found that McGillivray at the time he received the injuries which caused his death was an employee of petitioner and that the injury arose out of, and in the course of, his employment as such employee. In our opinion, there is no evidence to support this finding. As appears from the facts, the relation of the Los Angeles office of petitioner to the foreman on the ground in charge of the work, having sole power to engage laborers, was identical with that of an employment office in finding work for those seeking employment. As was done in this case by Swartz, they are informed as to wages, terms, and conditions upon which, if satisfactory, employment may be obtained by applying to the person in charge of work at a designated place. But until such application is made and the party accepted, the relation of employer and employee is not established. The information as to wages, terms, and conditions under which petitioner was employing men upon the Ridge Route, coupled with the statement made by Swartz that deceased could secure a job there if he proved satisfactory to the foreman in charge of the work, no doubt induced him to undertake the trip in the hope

of obtaining employment; but, in the absence of proof that he applied to the foreman or entered upon service, it is insufficient to establish the relation of master and servant, without which compensation for injury or death cannot be awarded. Deceased knew that success in obtaining employment depended upon the foreman who, as shown by the uncontradicted evidence, was vested with full and arbitrary power in determining whom he would or would not employ. Hence, until he had reported to the foreman and there was some word or act on his part manifesting an acceptance of his proffered service, he could not be said to be an employee of the Highway Commission. Indeed, upon arriving at the camp and finding conditions unsatisfactory, he might, at his option, conclude that he would not apply for work. He was traveling upon his own time, for his own benefit, was not performing, and had never performed, any service for petitioner. [2] The fact that he, instead of providing his own means of conveyance and cost of transportation, availed himself of the proffered offer of petitioner to advance the cost thereof, is an immaterial factor in the consideration of the question, since "the law operates upon a status, i. e., that of employer and employee, and affixes certain rights and obligations to that status." (*North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, [L. R. A. 1917E, 642, 162 Pac. 93].) Since the status did not exist, the provisions of the compensation act are not applicable.

The award is annulled.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 26, 1919.

All the Justices concurred.

[Civ. No. 2944. Second Appellate District, Division One.—March 27, 1919.]

ANNA FARRISEE, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

- [1] **JUSTICE'S COURT APPEAL—HOW TAKEN.**—An appeal from a justice's court is taken by filing a notice thereof with the justice and serving a copy thereof upon the adverse party, but is not effectual for any purpose unless an undertaking be filed.
- [2] **ID.—TRANSFER OF JURISDICTION.**—When the appellant, on an appeal from a judgment rendered in a justice's court, has filed and given the notice of appeal and filed the undertaking, as required by the code, the justice is divested of all jurisdiction in the matter other than, as required by section 977 of the Code of Civil Procedure, and subject to the payment of his fees, to transmit the record to the clerk of the superior court for further proceedings.
- [3] **ID.—JURISDICTION OF SUPERIOR COURT—HOW DIVESTED.**—On such appeal, the jurisdiction of the superior court attaches upon the perfecting of the appeal by the filing of the undertaking, and having once attached, can only be divested by an order of dismissal or some other act of that court.
- [4] **ID.—JUSTIFICATION OF SURETIES—DISMISSAL OF APPEAL—CONSTRUCTION OF CODE.**—While section 978a of the Code of Civil Procedure provides that where an exception to the sufficiency of the sureties is interposed, they must justify within five days thereafter, otherwise the appeal must be regarded as if no such undertaking had been given, this does not, *ipso facto*, affect the appeal, the perfecting of which has vested jurisdiction of the case in the superior court, but the provision is to be construed as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual.
- [5] **ID.—FAILURE OF SURETIES TO JUSTIFY—SECOND ATTEMPTED APPEAL INEFFECTIVE.**—Where, on an appeal from a judgment rendered by a justice's court, the sureties upon the undertaking, in response to exception to their sufficiency, fail to justify, the superior court has no jurisdiction other than to dismiss the appeal, notwithstanding that before the expiration of the time within which the sureties might qualify and while the first appeal is operative, a second notice of appeal and undertaking thereon are filed.

PROCEEDING in Certiorari to review the action of the Superior Court of Los Angeles County in denying petitioner's

motion to dismiss an appeal from a judgment rendered by a Justice's Court. Order denying motion annulled.

The facts are stated in the opinion of the court.

Louis N. Wheaton for Petitioner.

Charles M. Ackerman for Respondents.

SHAW, J.—*Certiorari*. The question presented is the power of the superior court to proceed with the trial of an action pending therein on appeal from a judgment rendered by a justice's court, after denying a motion to dismiss the same made upon the ground that the superior court is without jurisdiction to try the case, for the reason that the sureties upon the undertaking failed to qualify within five days after exceptions interposed to their sufficiency, and that a second notice of appeal and undertaking thereon, filed before the expiration of the time within which the sureties might have qualified and while the first appeal was operative, was a nullity.

[1] An appeal from a justice's court is taken by filing a notice thereof with the justice and serving a copy thereof upon the adverse party (Code Civ. Proc., sec. 974), but it "is not effectual for any purpose, unless an undertaking be filed" (Code Civ. Proc., sec. 978). This implies that it is effectual if the undertaking required be filed. [2] Appellant, in giving the notice and filing the undertaking, having fully complied with the provisions of the code, the justice was divested of all jurisdiction in the matter other than, as required by section 977 of the Code of Civil Procedure, and subject to the payment of his fees, to transmit the record to the clerk of the superior court for further proceedings. [3] "The jurisdiction of the superior court attached upon the perfecting of the appeal by the filing of the undertaking, and having once attached could be divested only by an order of dismissal or some other act of that court." (*Moffat v. Greenwalt*, 90 Cal. 368, [27 Pac. 296].) The first appeal having been perfected, it, *ipso facto*, effected a transfer of the case to the superior court; hence, there was nothing in the justice's court which could be made the subject of the second appeal (*Brown v. Plummer*, 70 Cal. 337, [11 Pac. 631]; *Tompkins v. Mont-*

gomery, 116 Cal. 120, [47 Pac. 1006]), and the proceeding, since there was nothing upon which it could operate, was, therefore, a nullity. [4] While section 978a of the Code of Civil Procedure provides that where an exception to the sufficiency of the sureties is interposed they must justify within five days thereafter, otherwise the appeal must be regarded as if no such undertaking had been given, this does not, *ipso facto*, affect the appeal, the perfecting of which has vested jurisdiction of the case in the superior court, but, as said in *Moffat v. Greenwalt*, *supra*, the provision is to be construed "as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual." [5] The purported appeal in the second proceeding, therefore, being a nullity and the sureties upon the undertaking on the first appeal having, in response to exception to their sufficiency, failed to justify, it follows that upon the conceded showing of such fact made, the court had no jurisdiction other than to make an order granting petitioner's motion.

The order denying petitioner's motion to dismiss the appeal in that certain action wherein Lewis E. Tucker is plaintiff and petitioner is defendant, now pending in the superior court of Los Angeles County, is annulled, and it is further ordered that respondent refrain and desist from any action or proceeding therein other than to make an order dismissing the appeal from the judgment rendered by the justice's court.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1905. Third Appellate District.—March 28, 1919.]

CHAS. B. BLESSING, etc., Respondent, v. EMMA FETTERS et al., Appellants.

[1] LANDLORD AND TENANT — EVICTION — TERMINATION OF LEASE — RECOVERY OF DEPOSIT.—In this action brought by a successor in interest of a tenant to recover from the landlord moneys deposited as security for the performance of the covenants of the lease, upon the claim that there had been an eviction of the tenant by the landlord and a consequent termination of the lease, there was sufficient

evidence to justify the finding of the trial court that there was a termination of the lease by eviction, and consequently the landlord was not entitled to retain the deposit.

- [2] **ID.—CONSTRUCTIVE EVICTION.**—Any intentional and injurious interference by the landlord which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially impairs such beneficial enjoyment, is a constructive eviction.
- [3] **ID.—RETENTION OF DEPOSIT.**—A landlord is not entitled to retain a deposit given to secure certain covenants after the termination of the lease by eviction.
- [4] **ID.—ASSIGNMENT OF LEASE—BREACH OF COVENANT—FORFEITURE.**—Although an assignment of a half interest in a lease to a person with whom a partnership had been formed and its subsequent use by the partnership was without the written consent of the landlord and in violation of a covenant in the lease, it did not create a forfeiture of the lease, especially after the landlord accepted the rent with knowledge of the assignment.
- [5] **ID.—BANKRUPTCY OF PARTNER—RIGHT TO POSSESSION.**—Even after such assignee filed his petition in bankruptcy, the original lessee was entitled to hold possession and to have someone on the premises on his behalf, not only under his right as original lessee but also as the remaining solvent partner, until he consented to have the partnership property administered in bankruptcy.
- [6] **PARTIES — ACTION AGAINST WIFE — JOINDER OF HUSBAND — JUDGMENT.**—In an action against a married woman in which her husband is joined as a party defendant merely because he is such husband, no judgment should be entered against him.

APPEAL from a judgment of the Superior Court of Sonoma County. Thos. C. Denny, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

W. F. Cowan for Appellants.

Reuben G. Hunt and Samuel M. Samter for Respondent.

BUCK, P. J., *pro tem.*—This is an action brought by a successor in interest of a tenant to recover from the landlord moneys deposited as security for the performance of the covenants of the lease, upon the claim that there had been an eviction of the tenant by the landlord and a consequent termination of the lease. With the foregoing cause of action there is

joined a cause of action to recover the sum of \$250 deposited by the tenant with the landlord at the time of the making of the lease, with the understanding that this sum should be returned by the landlord to the tenant at the termination of the lease upon the renewal of a certain liquor license in favor of the landlord.

The case was tried without a jury, and the court found that there was an eviction and that plaintiff was entitled to recover the \$250 deposited to cover the saloon license, and also was entitled to recover the sum of one thousand dollars deposited as security for the performance of the covenants of the lease, less the sum of \$350, being the damage caused by breach of covenant to take proper care of the premises and goods leased. Judgment accordingly in the sum of nine hundred dollars was given against defendants Emma Feters and her husband George Feters, from which they each took this appeal.

In appellants' brief no points are made or suggested in regard to the findings or evidence in the cause of action in regard to the \$250 deposited on account of the liquor license.

In their brief "appellants claim in this action that the sole question for decision is did the lessor either actually or constructively evict the tenant Nichols?" On this issue the finding of the court was as follows:

"On or about the thirteenth day of September, 1917, the defendant Emma Feters, while the said lease was still in full force and effect, wrongfully re-entered upon the said hotel premises and evicted all persons therefrom and assumed possession thereof, all without the consent and against the will of said partnership, said Nichols, and said bankrupt, and thereby terminated said lease and released the said Nichols from his obligation to pay rent under said lease. Ever since such re-entry the defendant Emma Feters has been and now is in full possession of the said premises to the exclusion of said Nichols, the said bankrupt, the said partnership, and the plaintiff as such receiver and trustee. Ever since on or about the fourth day of October, 1917, the defendants have been operating the said hotel premises for their own use and benefit, to the exclusion of said Nichols, the said bankrupt, the said partnership, and the plaintiff as such receiver and trustee."

This finding is in strict accord with the issues made by the pleadings, and no issue is raised by the pleadings in regard

to the termination of the lease in any other manner than by the eviction above found.

On most points the evidence is sharply in conflict, and in some respects the inferences which may be drawn from the evidence are equally conflicting. But it substantially appears from the evidence that the lease in question was executed on the second day of January, 1917, for the term of five years, at the annual rental of \$960, payable quarterly in advance, and was for the property known as the "Hotel Chauvet," consisting of the hotel building and hotel equipments and furniture therein contained, and of the estimated value of one thousand dollars. The lease contained the usual covenants for the payment of rent, and that the tenant should not "voluntarily or involuntarily assign this lease without the written consent" of the landlord, and provided that the tenant should conduct the hotel business in a quiet, lawful, and orderly manner, and should properly care for the premises and keep the buildings in good condition of repair at his own cost and expense, and "upon the expiration of this lease or any sooner determination thereof, the tenant will quit and surrender the premises and all of said personal property in as good state and condition as reasonable use and wear thereof will permit." And the lease further recited that the tenant, upon the execution of the lease, has deposited with the landlord "the sum of one thousand (\$1000.00) dollars as a guaranty that he will faithfully perform each and every of the covenants of this lease, and said sum of one thousand (\$1000.00) dollars is to be kept and retained by the said party of the first part (the landlord) during the term of this lease as a guaranty for the faithful performance thereof, and any damage or detriment that said party of the first part may sustain by reason of any violation of any of the covenants of this lease shall be indemnified and paid from said sum of one thousand (\$1000.00) dollars."

On May 15th, following the execution of the lease, the tenant Nichols entered into an agreement of partnership with one Oscar Banks for the purpose of conducting the hotel and saloon business in the leased premises. For a one-half interest in the business Banks paid to Nichols the sum of eight hundred dollars and received from Nichols an assignment of a one-half interest in the lease and moneys deposited under the terms of the lease. The defendant had knowledge of this transaction and of the association of Banks in the business,

but never gave any written consent to the assignment, though there is testimony to the effect that she promised so to do. On July 1, 1918, the rent, payable quarterly in advance to October 2, 1918, was paid by Nichols and accepted by the landlord. Later in July some controversy arose between the parties and the landlord, Emma Feters, who claimed that the hotel business was not being conducted in a proper and lawful manner, and after offering Banks \$250 for his interest she stated, "If you don't want to sell sooner or later you have to go out, and if you don't go out I will show you that I have to put you out." About two weeks after this Nichols went away on a trip, leaving his partner Banks "in charge of the place." But he returned in about two weeks after some attachments had been levied upon the place. After these attachments were paid off by himself and Banks, he went away again, leaving Banks in charge, and saying that "he wanted to go on a trip." Shortly after other attachments were levied and Mrs. Feters appeared at the place and told Banks "that if Mr. Nichols wasn't there she would have to take over the place and if I would not go out she would put me out, and that I had no business over there and I should not stay; that I would spoil her business, her whole investment." To which Banks replied, "I am in charge of this place, and I take very well care for it." Whereupon Banks "sent a telegram to Mr. Nichols that the Chauvet hotel, the saloon was attached, and I ask him for his advice what to do. I waited a couple of days and finally a telegram came and said to do the best I could, so I went up to Santa Rosa and I left Mr. Billie Karns in charge of the place and I told him if anybody comes and wanted to go in that place don't let them in." Upon returning from Santa Rosa about September 11th, Banks was taken in custody by the constable upon a warrant of arrest sworn to by Mrs. Feters and taken back to the hotel, where he found Mrs. Feters in possession with the constable. She told him, among other things, "If you don't go out I will have to put you out, and if you don't go out I will put you in jail, you to stay there." After Mrs. Feters had taken an inventory of the furniture in the place, Banks was told by her that he could now go. And Banks left, fearing, as he states, that if he did not go she would have him prosecuted and sent to the state's prison. And "Mrs. Feters commanded the constable to lock everything in the house, let nobody in there, and she would

put somebody in or the constable would put somebody in, and Mr. Doon, what was there, I told him to take charge of the place, and she says, 'There will be nobody here in the place, that place belongs to me and I don't want to have nobody run my place.' So I went to take the bus to Napa and I never went back." Banks had already contemplated going into bankruptcy, and for that purpose had made an inventory of and segregated a part of the personal property belonging to him on the premises, and on September 13th Banks filed his petition in bankruptcy and on that day was adjudged a bankrupt. On September 28th the plaintiff herein was appointed receiver and on October 4th appointed trustee in bankruptcy. On September 20th Nichols filed in the bankruptcy court his written consent to the administration of the partnership affairs by the bankruptcy court. But prior to this and since the attachments were dissolved by the adjudication in bankruptcy Mrs. Feters directed the attachment keeper of the property on the premises to "stay there and take care of the place; that she would have to keep a man there on account of the neighbors." Also at the time of the last attachment, on or about September 11th, Mrs. Feters told one of the attaching creditors, who had just levied an attachment at her suggestion, "We will have to get them out, or I will have to get them out—. The remark was made at the time I put the attachment on there, struck me that Mrs. Feters certainly wanted to get them out."

[1] From the foregoing it appears that there was sufficient evidence to justify the finding of the trial court that there was a termination of the lease by eviction before the appointment of the trustee in bankruptcy, and that consequently the defendant landlord was not entitled to retain the deposit given to secure the performance of the covenants of the lease after it had been thus wrongfully terminated by her.

[2] As stated in the case of *New State Brewing Assn. v. Müller*, 43 Okl. 183, [141 Pac. 1175]: "Any intentional and injurious interference by the landlord which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially impairs such beneficial enjoyment is a constructive eviction." And the case of *Onward Const. Co. v. Harris* (Sup.), 144 N. Y. Supp. 318, holds that threats and abusive language may in some instances be sufficient to constitute an eviction. [3]

And the following authorities are conclusive on the proposition that a landlord is not entitled to retain a deposit given to secure certain covenants after the termination of the lease by eviction: *Green v. Frahm*, 176 Cal. 259, [168 Pac. 114]; *Rehkopf v. Wirz*, 31 Cal. App. 695, [161 Pac. 285]; *Rez v. Summers*, 34 Cal. App. 527, [168 Pac. 156]; *Wollenshlager v. MacLean*, 34 Cal. App. 102, [166 Pac. 853]; *Tiffany on Landlord and Tenant*, pp. 1221, 1258; *Wilson v. Agnew*, 25 Colo. App. 109, [136 Pac. 96].

[4] Though the assignment of the half interest in the lease to Banks and its use by the partnership was without the written consent of the landlord and in violation of the covenant in the lease, it did not create a forfeiture of the lease, especially after the landlord had accepted the rent with knowledge of the assignment. (*Garcia v. Gunn*, 119 Cal. 315, 319, [51 Pac. 684].)

[5] The evidence is sufficient to show that at the time of Banks' eviction Nichols had not abandoned the lease and that Banks was attempting to hold possession, not only for himself, but also to take care of the property for Nichols. Furthermore, even after the bankruptcy proceedings on September 13th, Nichols was entitled to hold possession and to have someone on the premises on his behalf, not only under his right as original lessee but also as the remaining solvent partner until he consented to have the partnership property administered in bankruptcy. (*Francis v. McNeal*, 228 U. S. 696, at page 700, [L. R. A. 1915E, 706, 57 L. Ed. 1029, 33 Sup. Ct. Rep. 701, see, also, Rose's U. S. Notes].)

[6] Appellants insist that in any event the judgment against the husband, George Feters, should be reversed. And it is clear both from the evidence and the judgment-roll that no judgment should have been entered against him. In the complaint it is stated that "Said George Feters is joined as party defendant herein only because of the provisions of section 370 of the Code of Civil Procedure of the state of California." And at the opening of the trial counsel stated: "The only reason George Feters is joined as a defendant is because he is the husband of Emma Feters." But, notwithstanding this, the plaintiff took judgment that he "have and recover of and from the defendants Emma Feters and George Feters, her husband, the sum of nine hundred dollars, etc." By its terms this judgment unjustly binds and affects not only

the separate property of George Fetters but also the community property. But, as stated in the case of *Terry v. Superior Court*, 110 Cal., at page 88, [42 Pac. 465], husbands become "proper and necessary parties defendant, not, however, to the end that they or their property should be bound by the judgment, but solely that they might be able to aid their wives in their defense. The present utility of the statute in this progressive day may be open to question, but, however this may be, it was done at a time when the lawmakers, perhaps with mistaken chivalry, believed that a wife brought into litigation might be the better for the comfort, protection, and support of her husband's authorized presence." (See, also, *Van Maren v. Johnson*, 15 Cal. 308.)

Substantial justice, however, can be accomplished by a modification of the judgment. (*Davis v. Lamb et al.*, 5 Cal. Unrep. 765, [35 Pac. 306].)

It is therefore ordered that the judgment as to the defendant Emma Fetters be affirmed, with direction to the trial court that the judgment be modified so as to provide that it do not affect the separate property of the defendant George Fetters or the community property (*Van Maren v. Johnson, supra*), and as so modified the judgment will be affirmed without costs to either appellant.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 26, 1919.

All the Justices concurred.

[Civ. No. 2733. First Appellate District, Division Two.—March 28, 1919.]

CATHERINE TRULL, Respondent, v. THE INDEPENDENT ORDER OF PURITANS (a Corporation), Appellant.

- [1] **LIFE INSURANCE—MISNOMER OF INSURED—ACTION ON POLICY—EVIDENCE.**—In an action on a life insurance policy issued by a fraternal organization and assumed by the defendant, there is no error in admitting in evidence over objection of the defendant the original certificate of insurance which purported to run to "George E. Prull" instead of "George E. Trull," where the defendant had received payments from Trull, and in its answer set up its assumption of the particular certificate, referring to it by number.
- [2] **ID.—ANSWER—WRITING NOT DENIED—ADMISSION.**—In such action, where the application for the assumption of the insurance contract by the defendant was set forth in full in its answer, and was not denied under oath within ten days, it was admitted for all purposes of the case.
- [3] **ID.—MISREPRESENTATIONS—BURDEN OF PROOF.**—In such action, the burden of proving misrepresentations was on the defendant, and where the only witness it produced was the physician who examined the insured, and he testified that at the time of the application for assumption of the policy he had no reason to believe that the insured was otherwise than in good health, it not only failed to make out its defense, but supported the plaintiff's case.
- [4] **ID.—SUFFICIENCY OF COMPLAINT.**—In this action on a life insurance policy, the complaint was not defective in failing to set forth in full the original application for insurance.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. E. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Charles F. Fury for Appellant.

Olin L. Berry for Respondent.

LANGDON, P. J.—The defendant appeals from a judgment on a life insurance policy issued by the Knights of Honor and assumed by the defendant.

From an examination of the entire record, it appears that in 1890 the Knights of Honor issued a policy or certificate of insurance in the name of George E. Trull, which was delivered to George E. Trull. The Knights of Honor received payments of premiums from Trull for something over twenty-five years, the last payment having been made in November, 1915, one month after the Knights of Honor had gone into the hands of a receiver. The acceptance indorsed on the certificate was signed George E. Trull. On November 13, 1915, Trull made an application to the defendant for the latter organization to assume the insurance, in which the applicant recited the facts of his membership in the Knights of Honor, warranted that he was then in sound health, that he knew no cause in connection with his physical condition that would be a bar to his securing life insurance, or would in any way shorten his life, and that any untruthful statements or violations of the laws of this order should render his certificate void. This application was accepted by the defendant, which issued to him a receipt-book in the name of George E. Trull, in which it entered successive payments made to it by him, monthly. Trull died in June, 1916, and the defendant refused to pay to the beneficiary, the widow of the insured, who brought this suit.

In the complaint it is alleged that the Knights of Honor issued "a certain policy of insurance in the words and figures following, to wit" (here being set forth the original benefit certificate). The certificate stated that it was issued "upon evidence received from said Lodge (one in San Francisco) that he has lawfully received the degree of Manhood, and is a contributor to the Widows and Orphans Benefit Fund of this Order and upon condition that statements made by said member in his petition for membership, and the statements made by him to the Medical Examiner, be made a part of this contract, *and warranted to be true*, and upon condition that he complies with the laws, rules and regulations now governing this Order, or that may be hereafter enacted for its government."

The defendant demurred generally and specially, because the statements made to the medical examiner were not alleged. After the demurrer was overruled, the defendant answered, denying the issuance of the certificate and that it was as set forth in the complaint for the reason that it had no information or belief on the subject sufficient to enable it to answer

thereto. There were similar denials in regard to the allegations as to the payment of premiums and the performance of conditions by the insured under the terms of the policy, and as to the alleged financial difficulties of the Knights of Honor. The defendant set up the application of Trull to the defendant for the assumption of the insurance, and alleged on information and belief that at the time of making the latter application Trull was suffering from a disease which, it was further alleged, contributed to his death.

The appellant relies on claimed errors in rulings on evidence, insufficiency of the evidence to justify the decision, and claimed error in overruling the demurrer.

[1] The defendant's first exception was to the admission over objection of the original certificate of insurance, because it purported to run to George E. Prull instead of George E. Trull. The suit was on the contract of the defendant assuming in favor of Trull and his beneficiary the obligation of the Knights of Honor to pay on the original certificate issued to Trull although the name was written therein as Prull. It does not appear the defendant was in any way misled. The defendant had received payments from Trull, and in its answer it set up its own assumption of the particular certificate, referring to it by number. The lower court treated the word "Prull" in the certificate as a clerical error. Under all the circumstances the certificate was properly received in evidence.

[2] The defendant offered in evidence the application for the assumption of the insurance contract by the defendant and excepted to its rejection by the court. The application was set forth in full in the answer, and was not denied under oath within ten days. It was therefore admitted for all purposes of the case. (Code Civ. Proc., sec. 448.) The court found that it was made by Trull and further found that the statements contained in it were not untrue. If these findings are supported, the appellant was not injured by any remarks made by the judge at the time of his ruling concerning the materiality of the evidence.

[3] The appellant claims the evidence was insufficient to justify the decision. The finding that the original certificate was issued to Trull is attacked. This is the same contention in regard to the clerical error by which the name was written Prull, although both insurers received the premium payments from Trull. This finding was sustained by the evidence. The

finding that the statements made in the application for assumption are true is sustained by the evidence notwithstanding the attempt on the part of the appellant to avoid the effect of the evidence of its own medical witness, the attendant physician of Mr. Trull, who testified that at the time of the application for assumption he had no reason to believe that Trull was otherwise than in good health. The burden of proving misrepresentations was on the defendant, and the only witness it produced was the physician. It not only failed to make out its defense, but supported the plaintiff's case. No other finding could properly have been made. (*Mickschl v. National Council etc.*, ante, p. 100, [180 Pac. 27]; *Speegle v. Leese*, 51 Cal. 415; *Leviston v. Ryan*, 75 Cal. 293, [17 Pac. 239]; *Connolly v. Hingley*, 82 Cal. 643, [23 Pac. 273].)

[4] Appellant's last contention is that the complaint does not state facts sufficient to constitute a cause of action. Reliance is placed on *Gilmore v. Lycoming Ins. Co.*, 55 Cal. 123. Reference is made to *Tischler v. California Farmers' Mut. F. Ins. Co.*, 66 Cal. 178, [4 Pac. 1169], and *Schenck v. Hartford Fire Ins. Co.*, 71 Cal. 28, [11 Pac. 807]. After these cases were decided the supreme court reconsidered the matter in *Cowan v. Phenix Ins. Co.*, 78 Cal. 181, [20 Pac. 408]. A quotation from the opinion in the latter case is determinative upon the contention made by the appellant. "It is argued that the complaint is defective in that it does not set forth the application of the assured which is declared to form a part of the policy. It appears clearly from the complaint that there was an application which was made a part of the policy. The contents are not stated in the complaint. But it is stated in the complaint by appending the policy to and making it a part of it, that there was an application and that that application should be considered a warranty by the assured. This stipulation of the contract is a solemn engagement by the assured that the representations made in the application at the time they were made, and when the policy became a contract, were true and correct. There are two classes of conditions usually inserted in policies, the first pointing to the time of the contract, and second to things which may occur or which may have to be performed at a time subsequent. In the former case the stipulation is called an *affirmative warranty*, and in the latter, a *promissory warranty*. . . . Affirmative warranties are sometimes called warranties *in praesenti*. A

breach of an affirmative warranty consists in the falsehood of the affirmation, when made, of a promissory warranty, which is in its nature executory, of the nonperformance of the stipulation. . . . In counting on a policy of insurance, we cannot see that there is any necessity of averring performance by the insured of anything warranted to be true when the policy was issued, for the reason that there was nothing to be performed. When the assured has warranted a thing to exist or a representation to be true, at a time when the policy becomes consummated as a contract, he has done all he can do." Further, referring to the provisions of Code of Civil Procedure, section 457, permitting the pleader to state he has performed all the conditions of the contract, the court said: "It is said that something material, or which may be material to plaintiff's right to recover, has been left out of the complaint. In reply to this, we say it does not appear that anything material in the application, or which may be material to plaintiff's case, has been left out. The application is not before us, and we cannot say what is in it; therefore we cannot say that anything material is omitted. As to the contention that there may be something material in the application which is omitted from the complaint, in addition to what is said above we will further say that a demurrer to a complaint should not be sustained, because there may be possibly something in an application affecting plaintiff's right to recover which is not averred in the complaint. Certainly we should not reverse a ruling of the court below overruling a demurrer on a 'perhaps.' Error should clearly appear to justify such a course."

The appellant seeks to distinguish this case from the present one because the court added: "In ruling against the defendant on the point above discussed, we desire to say further, that we cannot see how it can receive any detriment from the lack of the suggested allegation. The policy states that the application is filed with the defendant, and in its answer defendant can set it out and aver nonperformance of anything required by it to be performed." The reasoning applies with equal force here. The defendant assumed the obligations of the contract in its entirety. It must have been fully informed in regard to its terms. It accepted the premiums paid after the assumption. If it did not know the terms of the contract when it assumed them, it could not be heard to say after ac-

cepting its benefits that it had no information regarding those terms. Yet, that is just what it did say in its answer.

The judgment is affirmed.

Brittain, J., and Haven, J., concurred.

[Civ. No. 2669. First Appellate District, Division One.—March 28, 1919.]

MINA H. JOHNSON, Appellant, v. C. WUNNER, Respondent.

- [1] **LEASES — ORAL CONTRACT FOR — SPECIFIC PERFORMANCE.** — An oral contract between a landlord and tenant whereby the tenant agrees to execute a new lease to the entire premises when certain additions to be made by the landlord for the benefit of such tenant have progressed to a given stage is at no period of its existence specifically enforceable.
- [2] **CONTRACTS — FULL PERFORMANCE BY ONE PARTY — MUTUALITY — SPECIFIC PERFORMANCE — DIVISIBILITY OF COVENANTS.** — Neither party to an obligation can be compelled specifically to perform it unless the other party has performed, or is liable to specifically perform; and under this rule the contract cannot be divided into independent covenants.
- [3] **LEASES — ACTION TO COMPEL SPECIFIC PERFORMANCE — DAMAGES FOR BREACH — PLEADING.** — In an action to compel specific performance of an oral contract to execute a lease, the court cannot allow damages for breach of the agreement where no issue of damages is tendered, the only allegation of damage in plaintiff's complaint being a mere conclusion of law "that unless said lease be executed plaintiff will suffer great and irreparable injury and loss."
- [4] **ID. — PLEADING — EQUITY.** — Before a court of equity can intervene, it is necessary to allege the facts entitling plaintiff to the relief sought.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Affirmed.

The facts are stated in the opinion of the court.

Walter H. Robinson for Appellant.

Costello & Costello and E. R. Hoerchner for Respondent.

KERRIGAN, J.—This is an action to compel specific performance of an oral contract, which plaintiff claimed was fully performed on her part. At the time the contract was entered into the parties occupied the relation of landlord and tenant. The defendant, who is the tenant, conducted a grocery-store in premises owned by plaintiff, and he was desirous of increasing the dimensions of his floor space. Accordingly the parties entered into an oral agreement whereby plaintiff agreed to purchase a vacant lot adjoining the leased premises, and erect thereon a building as an addition to the store held by respondent as lessee. The purchase of the lot was made by plaintiff for the sum of four thousand seven hundred dollars, and plans for the erection of the building were prepared. In these plans it was provided that the east wall of the leased building should be removed so that the addition erected should be connected with and open into the store, and thus become an integral part of it. It was further orally agreed by the parties that before the erection of the building reached the stage where the removal of said wall was necessary, a new lease of the entire premises would be executed. Thereupon plaintiff erected at a cost of some three thousand dollars the contemplated addition, which, having reached the point when it became necessary to remove the wall, plaintiff signed and tendered the contemplated lease, which defendant refused to execute. Construction of the addition was thereupon discontinued by plaintiff owing to defendant's refusal to comply with his agreement, and this action was brought to compel respondent to specifically perform his contract. Judgment went for defendant, and plaintiff appeals, taking his appeal on the judgment-roll alone.

[1] In support of the judgment respondent argues that as the agreement was one for the erection and completion of a building, it is not the subject of specific performance, for the reason that it lacked mutuality; and it was upon this ground that the trial court rendered judgment in favor of defendant. It is conceded that contracts of this character cannot generally be specifically enforced, the reason being that the obligor cannot be forced to perform, and that therefore the obligee

should not be compelled so to do. But, it is insisted that in the instant case the contract was fully performed, for the reason that the parties having agreed to execute the lease when the work had progressed to the point when the intersecting wall was to be removed, when that time arrived nothing further remained executory. But a contract of this character at no period of its existence is specifically enforceable. [2] Neither party to an obligation can be compelled specifically to perform it unless the other party has performed, or is liable to specifically perform, everything that he has thereby undertaken (*Los Angeles v. Occidental Oil Co.*, 144 Cal. 528, 532, [78 Pac. 25]; *Tuohy v. Moore*, 133 Cal. 516, [65 Pac. 1107]); and under this rule the contract cannot be divided into independent covenants (*Idem*). This being so, specific performance was rightfully refused.

[3] Plaintiff further claims that if the relief sought is not obtainable, she is still entitled to some relief. The only other possible relief would be damages for breach of the agreement. Plaintiff's whole theory of her cause of action, however, was for specific performance. Her complaint is entitled, "Complaint in specific performance of lease," and the prayer is confined to that form of relief. No issue of damages was tendered. The only allegation of damages in plaintiff's complaint is found in the recital "that unless said lease be executed plaintiff will suffer great and irreparable injury and loss." Such an allegation is a mere conclusion of law (*Mechanics' Foundry v. Ryall*, 75 Cal. 602, [17 Pac. 703]; *Bishop v. Owens*, 5 Cal. App. 87, [89 Pac. 844].) [4] Before a court of equity can intervene, it is necessary to allege the facts entitling plaintiff to the relief sought. Here no such facts are set forth.

For the reasons given the judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 2768. Second Appellate District, Division One.—March 28, 1919.]

THE CITY OF LOS ANGELES (a Municipal Corporation),
Appellant, v. **GEORGE T. CLINE** et al., Defendants;
BETTIE C. RORICK et al., Respondents.

[1] **STREET LAW—STREET OPENING ACT OF 1903—ABANDONMENT OF PROCEEDINGS—ATTORNEYS' FEES—CONSTITUTIONAL LAW.**—The provision of section 14 of the Street Opening Act of 1903, as amended in 1911, that if the proceedings to condemn and take land for street purposes "be abandoned or the action dismissed no attorneys' fees shall be awarded the defendants or either or any of them," is contrary to the limitations prescribed by the constitution, and, therefore, may not be enforced.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge. Affirmed.

The facts are stated in the opinion of the court.

Albert Lee Stephens, City Attorney, C. D. Pillsbury and Wm. P. Mealey, Deputy City Attorneys, for Appellant.

Daniel M. Hunsaker, Hunsaker, Britt & Edwards and Samuel Poorman, Jr., for Respondents.

CONREY, P. J.—In this action the plaintiff proceeded under the "Street Opening Act of 1903," and sought to condemn and take for street purposes certain land of the respondents. After trial and a verdict assessing the value of the land to be taken, an interlocutory judgment was entered whereby the property of the respondents was condemned to the use of the plaintiff upon the payment of the amount specified in the judgment. The compensation provided for by said judgment was not paid. Instead thereof, the city attorney, after being duly authorized thereto by the city council, moved the court for dismissal of the action, and a judgment of dismissal was entered. Thereafter, upon motion of the respondents, the court set aside the judgment of dismissal and entered a new judgment of dismissal, awarding to respondents their costs, including the sum of \$850 for attorney fees. From this judgment the plaintiff appeals, and this court is called upon to

determine whether or not the lower court was authorized to allow attorney fees to the respondents.

Title VII of part III of the Code of Civil Procedure prescribes the general rules for the exercise of the right of eminent domain in this state. In said title VII is contained section 1255a, which was added to that code by act approved March 17, 1911. [Stats. 1911, p. 377.] It provides for the right of abandonment of a condemnation proceeding and that "upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorney fees." Appellant does not challenge the constitutionality of section 1255a. That has been done in other cases, wherein the validity of the section was upheld. (*City of Sacramento v. Swanston*, 29 Cal. App. 212, [155 Pac. 101]; *Silver Lake etc. Co. v. City of Los Angeles*, 32 Cal. App. 123, [162 Pac. 432].) It was held that the proceeding to condemn property for a public use "is so differentiated from the ordinary actions or proceedings in a court of justice . . . as to bring it within the settled test justifying the assignment of the proceeding to a particular class for the purposes of reasonable provisions not applicable to other classes of actions."

Section 6 of the Street Opening Act of 1903, [Stats. 1903, p. 378], provides that the action for condemnation of land in proceedings under that act "shall, in all respects, be subject to and governed by such rules of the Code of Civil Procedure now existing, or that may be hereafter adopted, as may be applicable thereto, except in the particulars otherwise provided for in this act." Section 14 of that act declares the time and terms upon which proceedings thereunder may be abandoned. By act approved April 12, 1911, [Stats. 1911, p. 895, sec. 1], the legislature made the following addition to said section 14: "If the proceedings be abandoned or the action dismissed no attorneys' fees shall be awarded the defendants or either or any of them." Appellant contends that by reason of this amendment, respondents are deprived of the right to attorney fees in this action, which right they otherwise could claim under section 1255a of the Code of Civil Procedure. To this contention the respondents

reply that said amendment of section 14 is void because it is in conflict with certain prohibitions contained in the constitution of the state.

"All laws of a general nature shall have a uniform operation." (Const., art. I, sec. 11.)

"The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . .

"3. Regulating the practice of courts of justice. . . .

"33. In all other cases where a general law can be made applicable." (Const., art. IV, sec. 25.)

These provisions of the constitution have been illustrated and applied in numerous decisions, to only a few of which we need briefly refer. In *City of Pasadena v. Stimson*, 91 Cal. 251, [27 Pac. 607], after some discussion of earlier cases, the court said: "The conclusion is, that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." In *Title etc. Restoration Co. v. Kerrigan*, 150 Cal. 289, 325, [119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682, 88 Pac. 356, 366], the supreme court again was called upon to define the differences between general laws and those which are special, and to emphasize the fact that under appropriate circumstances special rules may be made which, although applicable only to particular classes of cases, yet retain the characteristics of general laws. The court said: "After all, the question of classification is primarily for the legislature. The court is not to set aside a statute merely because in its view it may have been unwise or unnecessary to apply certain rules to one class of cases. Before the act can be declared invalid on this ground, it must appear to the court that there was no reasonable basis on which the peculiar legislative provision could have been made."

[1] The Street Opening Act of 1903 is not the only statute under which the plaintiff might have elected to open the street and condemn therefor the land of respondents. Section 36 of that act provides that said act shall in no wise affect the Street Opening Act approved March 6, 1889, [Stats. 1889, p. 70], or

any other acts on the same subject, but is intended to provide an alternative system of proceedings for the purposes stated. As the act of 1889 is silent on the subject of allowances for attorney fees, it follows without any doubt that proceedings under that act are governed by the provisions contained in section 1255a of the Code of Civil Procedure, under which, upon abandonment and dismissal of the action, attorney fees must be allowed. There is no difference between the act of 1889 and the act of 1903, upon which to base a discrimination which would deprive the defendants of the right to an allowance for attorney fees in one proceeding, although that right clearly exists in the other proceeding. Moreover, there is much force in the argument of respondents, that the rule stated in section 1255a of the Code of Civil Procedure, allowing attorney fees generally upon abandonment and dismissal of condemnation proceedings, should exclusively control all such cases, because equally in all such cases the defendant property owner is brought into court against his will and without any claim that he has violated any obligation due from him to the plaintiff. In this respect the situation of the defendant is precisely the same in an action to condemn land for street purposes as in an action to take his land for the use of a railroad or for any other public use. Our conclusion is, that the provision here under consideration, of section 14 of the Street Opening Act of 1903, is contrary to the limitations prescribed by the constitution, and therefore may not be enforced.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 26, 1919.

Shaw, J., Melvin, J., Lennon, J., and Olney, J., concurred.

[Civ. No. 2330. Second Appellate District, Division One.—March 28, 1919.]

L. J. THOMAS, Respondent, v. NEWMARK GRAIN CO.
(a Corporation), Appellant.

[1] CORPORATIONS — ACTION ON WRITTEN INSTRUMENT — AUTHORITY OF AGENT—PLEADING.—In an action against a corporation on a written instrument which appears to be in form a bill of exchange, but in effect answers to a promissory note, as defined in section 3245 of the Civil Code, alleged to have been executed by the person in charge of the business of such corporation, an allegation that such person in charge of the corporation's business had authority to execute the instrument is essential to show liability against such corporation.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge. Reversed.

The facts are stated in the opinion of the court.

A. M. Norton and Childers & Bruce for Appellant.

Galen Nichols for Respondent.

JAMES, J.—Appeal from a judgment entered in favor of the plaintiff, presented on the judgment-roll alone.

[1] We think that the appellant is right in its claim that the complaint in the case failed to state facts sufficient to constitute a cause of action. It was first alleged that the appellant is a corporation organized under the laws of California and having and maintaining a place of business in the city of El Centro, county of Imperial. These allegations followed: "That defendant F. A. Wolz is, and was during all the times mentioned in this complaint, the duly authorized and accredited and acting agent of the defendant Newmark Grain Co.; that said F. A. Wolz is, and was at all times mentioned in this complaint, in charge of the business of the defendant Newmark Grain Co., in the county of Imperial, and is, and was, in charge of the place of business of the said defendant in the city of El Centro, county of Imperial, state of California. That on the 9th day of June, 1915, for a valuable consideration, the said F. A. Wolz, as such agent at El Centro, said

county and state, made and executed a certain draft in words and figures as follows: 'El Centro 6/9/15 A No 197 Newmark Grain Co., Incorporated, 447 So. Los Angeles St., Los Angeles, Cal. Pay to the order of L. J. Thomas \$600.00 six hundred & no/100 dollars. 18627 18627 F. A. Wolz,' and thereupon delivered said draft to the plaintiff herein." The fourth paragraph of the complaint alleged that the "draft" was presented for payment to appellant and payment refused, and that no part thereof had been paid. The written instrument set out in the complaint appears to have been executed by Wolz alone. Therefore, it was both necessary, in order to charge appellant, that it be made to appear that the instrument was executed on its behalf, and that Wolz possessed authority to execute the same. While it is stated that Wolz was "in charge of the business of defendant Newmark Grain Co. in the county of Imperial," and that "as such agent at El Centro" he made and executed the draft, there is no allegation showing that his authority as the person in charge of the defendant's business, whatever it might have been, included authority to execute a writing such as that sued upon. We think that such allegation was essential to show liability against this appellant. The instrument appears to be in form a bill of exchange, but in effect answering to a promissory note, as defined in section 3245 of the Civil Code.

The judgment appealed from is reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1856. Second Appellate District, Division One.—March 23, 1919.]

HOME TELEPHONE AND TELEGRAPH COMPANY
(a Corporation), Respondent, v. **THE CITY OF LOS ANGELES** (a Municipal Corporation), et al., Appellants.

[1] **TAXATION — LEGAL COERCION — PAYMENT UNDER PROTEST — RECOVERY.**—It is not essential to a recovery of a public tax that the person from whom payment thereof is demanded be threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away. There may be penalties which

fall perhaps short of this mark to avoid which the person paying may protect himself by protest.

[2] **ID.—VOID MUNICIPAL ORDINANCE—THREATENED ENFORCEMENT OF PENALTIES.**—Payment under protest of license fees exacted under a void municipal ordinance may not be considered as voluntary where such ordinance provided not only for delinquency penalties, but also for the arrest of those who violated any of the provisions of the ordinance, with a possible fine and imprisonment, and the enforcement of the "penalties" of the ordinance was threatened if the fees were not paid.

[3] **ID.—SUFFICIENCY OF NOTICE OF PROTEST.**—Where such ordinance was in violation of the state constitution as amended, and the secretary of the plaintiff corporation had discussed with the license collector the effect of the amendment, and had claimed that under the amendment the plaintiff corporation should not be required to pay the tax, its written notice of protest filed at the time of the making of the license tax payments was sufficient, where such notice advised the license collector that the plaintiff corporation considered the ordinance void, and stated further that the ordinance was in violation of the constitution of the United States and of the fourteenth amendment thereof.

APPEAL from a judgment of the Superior Court of Los Angeles County. John M. York, Judge. Affirmed.

The facts are stated in the opinion of the court.

Albert Lee Stephens, City Attorney, and Charles S. Burnell, Assistant City Attorney, for Appellants.

John E. Biby for Respondent.

JAMES, J.—This appeal is taken by the defendant city of Los Angeles and certain of its officers from a judgment entered in favor of the plaintiff. The judgment was for the return of certain fees paid as a license for the conducting of a telephone business within the city of Los Angeles. It was admitted that under an amendment to the constitution of the state, adopted in November, 1910 (sec. 14, art. XIII), the municipality had no power to exact a license tax from the plaintiff, and that its ordinance attempting so to do was void. The ordinance under which the claim for license tax was made against the plaintiff provided that telephone companies should pay a license tax monthly; that any tax remaining unpaid for

a period of ten days should have added a penalty of ten per cent; that "any person, firm, or corporation" violating any of the provisions of the ordinance should be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not less than five dollars nor more than two hundred dollars, or by imprisonment in the city jail for a period of not more than one hundred days, or by both such fine and imprisonment; and that "each such person, firm, or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted. . . ." There was testimony heard by the trial judge on behalf of the plaintiff showing that the secretary of the latter had had interviews with the tax and license collector, whose duty it was to enforce the terms of the license ordinance, and that it was orally called to the attention of the collector during these conversations that the constitution had been amended, and the officer of the plaintiff inquired if the city attorney had not advised them regarding the noncollection of the license tax, and that the tax collector had answered, "No"—that "they were going right ahead with the operation of it, and that we would have to pay up or they would have to enforce the penalties." Further conversation was had to the same effect, the tax collector's office insisting upon payment of the tax; whereupon the tax was paid by the plaintiff, the payments being accompanied by a written notice of protest. The secretary of the plaintiff corporation testified that he feared proceedings of arrest if payment was not made. He testified further: "My recollection was that in the interview that we had in the tax and license collector's office, the general statement was made, 'You know the provisions of the ordinance, and if you fail to comply with them you or somebody will have to be arrested under the provisions of the ordinance.' And practically every time we paid afterward there was an argument because we did not think it was a proper charge to be made, and thought it was illegally made. While I can't point to specific instances, I might say that we practically had an argument every time the payment was made right from January on, and even back of that."

Appellants raise several points in support of their claim that the judgment entered cannot be sustained. The principal one of these contentions is that the payments must be considered as

voluntary, as no acts were committed on behalf of the city such as would amount to legal coercion. Under the provisions of the ordinance, which have already been noted, there was a delinquency penalty to be imposed where the licensee failed to pay his license tax within ten days from the due date; a further provision existed providing for the arrest of those who violated any of the provisions of the ordinance, with a possible fine and imprisonment, the maximum being two hundred dollars fine or one hundred days in jail, respectively, and that each day during which such violation continued would constitute a separate offense. Appellant's counsel cite *Trower v. City and County of San Francisco*, 152 Cal. 479, [15 L. R. A. (N. S.) 183, 92 Pac. 1025], where the supreme court, in defining what constitutes legal duress which will give involuntary character to payments made under pretended force of law, declares: "The distinction to be observed is between a payment made for the purpose of protecting or securing the present enjoyment of a right to which the person is immediately entitled, and a payment made to prevent a threatened disturbance of such right where there is no authority to interfere with its enjoyment until the right of the threatening party shall be established in a judicial proceeding in which the rights of the respective parties may be presented and determined. In the latter case, a payment to avoid such threatened contest is regarded as voluntary, while in the former case it is compulsory." Also, *Justice v. Robinson*, 142 Cal. 199, [75 Pac. 776], the court there stating: "The general rule in reference to the payment of taxes under protest, where not controlled by some statutory provision, is, that in the absence of acts amounting to duress or coercion the payment is deemed to be voluntary, and a mere protest made at the time of such payment does not divest it of its voluntary character. Where there is no legal compulsion, the legal effect of the payment is not impaired by protest." A number of other cases are cited, among them some from other jurisdictions, which are all declarative of the generally accepted rule that there must be a sufficient showing of legal coercion before a person may pay a public tax and not have such payment considered voluntary. [1] We think, however, that it is not essential to a recovery of such a tax that the person be threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away. There may be penalties which

fall perhaps short of this mark to avoid which the person paying may protect himself by protest. As was said in *Atchison etc. Ry. Co. v. O'Connor*, 223 U. S. 280, [Ann. Cas. 1913C, 1050, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216, see, also, Rose's U. S. Notes], cited in *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, [142 Pac. 839]: "Courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if, at the same time, the citizen is put at a serious disadvantage in the assertion of his legal, in this case his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms." That case, to be sure, had to do with the payment of corporation franchise tax where the failure to pay the tax, if the same were determined legal, would have resulted in the corporation being deprived of its right to do business in the particular state. [2] If under the ordinance here considered the tax collector had only recourse to a civil action to collect the license tax, then there could be no payment under protest sufficient to divest the payment of its voluntary character, for the protestant could then contest the validity of the tax without suffering the risk of incurring excessive penalties or arrest. But in the enforcement of the provisions of the ordinance there was available to the tax collector the machinery of the municipal criminal courts, and with the provision of the ordinance, as stated, that a violation continued should be deemed a new offense on each succeeding day, the plaintiff might have incurred liability for a large amount of money by way of criminal fines before the legality of the tax could have been finally determined. This is assuming that the arrest would be that of the corporation under the provisions of the Penal Code, rather than the arrest of officials of the corporation individually. In addition to this, there would seem to be little doubt but that there might be such action on the part of the officials of the corporation in violation of the terms of the ordinance as might subject them to individual arrest and thus create an additional reason why the payments made to avoid such consequences should not be considered as voluntary. The secretary of the corporation, according to his testimony, had

it in mind that arrests might follow, as the tax collecting authority had informed him that the "penalties" of the ordinance would be enforced. The state of mind of the official was of more important legal consideration than any undisclosed intent of the officers whose duty it was to collect the city's license taxes. "And a threat of arrest for which there is no ground does not constitute duress, as the person threatened could not be put in fear thereby. But these rules fail to take into consideration that the question at issue in such cases is whether the mind of the person was overcome by impending criminal proceedings to such an extent as to make his act of payment involuntary. No hard-and-fast rule therefore should be laid down but each case must be decided on its own peculiar facts." (21 Ruling Case Law, sec. 178, p. 154.) Our conclusion on the proposition stated is that there was sufficient evidence to sustain the finding of the trial judge that the plaintiff was coerced into making the payments for which recovery was sought.

[3] It is next contended that the written protest filed at the time of the making of the license tax payments was not sufficient, for the reason that particular grounds were not sufficiently stated. The notice of protest did advise the license collector that the licensee considered the ordinance void, and it was further stated in the notice that the ordinance was in violation of the constitution of the United States and of the fourteenth amendment thereof. We have referred hereinbefore to the testimony of the secretary of the corporation wherein it was shown that he had discussed with the license collector the effect of the amendment made to the California constitution in 1910, and had claimed that under that amendment the plaintiff company should not be required to pay the tax; that notwithstanding this notification the collecting officer insisted that he would enforce the penalties of the ordinance. It has recently been held by our supreme court that such a protest may be made orally and that particular grounds thereof need not be expressly stated, where the collecting official is already informed of the reasons upon which the paying party objects to the tax. (*Spencer et al. v. City of Los Angeles et al.*, 180 Cal. 103, [179 Pac. 163].)

We have examined the specifications pointing to alleged errors of the court in receiving certain testimony, and are

satisfied that upon these assignments no such error is shown as to warrant a reversal of the judgment.

The judgment appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 2579. First Appellate District, Division One.—March 29, 1919.]

JOHN FERNALD, a Minor, etc., Respondent, v. EATON & SMITH (a Copartnership), Appellant.

[1] **NEGLIGENCE—EXCAVATION IN PUBLIC STREET—DUTY TO PUBLIC.—**

A person making an excavation in a public street is under the duty to take such precautions with respect to the excavation made as to avoid danger to users of the street; and in an action for personal injuries sustained by plaintiff by falling into such an excavation, evidence that the defendant failed to maintain a substantial barrier around that part of the excavation into which the plaintiff fell, established negligence on the part of the defendant.

[2] **ID.—FAILURE TO MAINTAIN BARRIER—PROXIMATE CAUSE OF INJURY.**

In this action for personal injuries, the negligence of the defendant in failing to maintain a substantial barrier around that part of the excavation into which the plaintiff fell was the proximate cause of the injury.

[3] **ID.—CONTRIBUTORY NEGLIGENCE — CARE REQUIRED OF MINOR — INSTRUCTIONS.—**

In this action for personal injuries sustained by a minor in falling into an excavation made by the defendant in a public street, the instructions given by the court fully advised the jury as to the degree of care required of a child of tender years and that whether the plaintiff himself was guilty of negligence was for them to determine from all the evidence in the case, taking into consideration his age and capacity.

[4] **ID.—MEASURE OF DAMAGES.—**

The law prescribes no definite measure of damages in such a case, but leaves the amount of damages to the sound discretion of the jury, taking into consideration all the circumstances attending the occurrence of the injury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge. Affirmed.

The facts are stated in the opinion of the court.

Melvin E. Van Dine and Robert H. Morrow for Appellant.

Theodore A. Bell for Respondent.

KERRIGAN, J.—This is an appeal by defendant from an adverse judgment in an action for personal injuries sustained by plaintiff, a boy eight years of age, by falling into an excavation made by the defendant in Buchanan Street, between Union and Green Streets, in San Francisco, its motion for a new trial having been denied.

From the evidence introduced by the plaintiff it appears that just before the accident the plaintiff had been playing in the street near his home; that at about 6:30 o'clock he ran down the west side of Buchanan Street to meet his father returning home from work, and that upon reaching a point about the middle of the block he deflected his course and proceeded to cross the street, and while doing so fell into an unguarded excavation, sustaining the injuries complained of. The excavation had that day been made by the employees of the defendant in the digging of a trench for the purpose of laying a conduit line under a permit issued by the board of public works of the municipality.

[1] From a careful review of the record, it clearly appears that the evidence supports the verdict of the jury that the defendant was chargeable with negligence. In the first place, this negligence may be predicated upon its remissness in observing the terms of an ordinance of the city providing that "Every person, firm or corporation by whom, or under whose immediate direction or authority, either as principal, contractor or employer, any portion of any public street may be made dangerous, must erect, and so long as the danger may continue, maintain around that portion of such street so made dangerous a good and substantial barrier, and cause to be maintained at both ends of such barrier, during every night, from sunset to daylight, a lighted lantern." (Ord. No. 868, approved June 26, 1903.) Moreover, without regard to this ordinance, the plaintiff's evidence established negligence on the part of the defendant in disturbing the normal condition of the street and leaving it in a condition unsafe for persons using it. Upon digging the trench, it was the plain duty of

the defendant to take such precautions with respect to the excavation made as to avoid danger to users of the street, but the evidence shows that it failed to maintain a substantial barrier around at least that part of the excavation into which the plaintiff fell, which omission of itself under the law established negligence on the part of the defendant.

[2] It is equally apparent, it seems to us, that this negligence was the proximate cause of the injury.

[3] In its instructions to the jury the court gave the following, among others: "The question as to whether or not the plaintiff himself was guilty of negligence is one of fact to be determined by the jury from all the evidence in the case, taking into consideration the age and capacity of the plaintiff, and all the other facts and circumstances appearing in the evidence. . . . You are further instructed that the law requires of a child suing for personal injury care and prudence equal to its capacity, and if you find from the evidence in this case that the plaintiff was a boy of ordinary intelligence and understanding for one of his years, and was aware that it was dangerous to play around an excavation of the character described by the testimony in this case, and knowing that fact and the hazards and dangers thereof, if any, (and) in consequence, and did so continue to play, and was injured as a result, then your verdict will be for the defendant." These instructions sufficiently covered this particular subject, rendering it unnecessary to instruct the jury thereon in the particular terms proposed by the defendant.

[4] Neither do we think that the damages assessed by the jury were excessive. The law prescribes no definite measure in such a case, but leaves the amount of damages to the sound discretion of the jury, taking into consideration all the circumstances attending the occurrence of the injury. In the present case such injury was quite severe, and we think the amount awarded to the plaintiff was not unreasonable.

The court fairly and fully instructed the jury on every phase of the case.

The judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 2619. Second Appellate District, Division One.—March 29, 1919.]

CLAIRE J. KIRCH, Respondent, v. JUNOT WATTELL et al., Appellants.

[1] **SALES — PURCHASE OF CHATTELS — SECURITY — DEFAULT — REMEDIES OF VENDOR.**—Where the purchaser of the furniture, furnishings, and leasehold interest in a certain lodging-house agrees to pay a part of the purchase price on a given date and to execute a chattel mortgage on the furniture for the balance, and as further security to execute a deed to certain real property to be deposited in escrow, and it is provided in the agreement that upon default of the purchaser to fulfill his obligations under the contract the deed is to be delivered to the vendor and the property forfeited as "liquidated damages," upon failure of the purchaser to make the payments as agreed, the vendor is not required to resort to an action for damages as her only means of obtaining satisfaction of the obligations assumed by the purchaser, but may pursue her remedy by an action for specific performance.

[2] **ID.—ACTION FOR SPECIFIC PERFORMANCE—DECREE.**—In an action for specific performance of such a contract, after default by the purchaser, the court properly decreed that the deed be delivered to the vendor to be retained by her as security for the performance of the obligations of the purchaser.

APPEAL from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Bernard Potter for Appellants.

Ira L. Brunk and J. H. Creighton for Respondent.

THE COURT.—[1] In this action a decree was entered agreeable to the prayer of the complaint requiring specific performance of the agreement made between defendant Wattell and the plaintiff. In the decree it was further determined that a deed made by Wattell to his codefendant was void as to the plaintiff. The cause of action grew out of a transaction had wherein plaintiff sold to Wattell the furniture, furnishings, and her leasehold interest in a certain lodging-house located in the city of Los Angeles. The agreement was ex-

pressed in part in a memorandum made at the time and signed by both parties, and in part by certain escrow instructions given to a trustee selected by the parties. Counsel for appellants in insisting that there was no mutuality such as would entitle the plaintiff to the remedy which she obtained in this action, refers only to the memorandum first made, which is only in part expressive of the admitted agreement intended to be entered into. In order to arrive at the full purpose of the contracting parties, the escrow instructions constituted a necessary part of the contract. The lodging-house sold by plaintiff to Wattell was furnished and the agreed price was \$3,750 for the furnishings, furniture, and leasehold interest. Wattell agreed first to pay the sum of one thousand two hundred dollars on or before the twenty-sixth day of December, 1914, and agreed to execute a chattel mortgage on the furniture for \$2,550, which should be payable in certain parts per month, with interest stated. It was provided that an extension of time might be given in certain contingencies. As further security that he would comply with the terms of the agreement, Wattell was to deposit a deed with the trustee, transferring title to a lot in the city of Los Angeles to the plaintiff, which deed was to be held by the trustee until default was made by Wattell, whereupon it was to deliver it to the plaintiff. It was stated in the agreement that upon default of Wattell to fulfill his obligations under the contract the deed was to be delivered to the plaintiff, and the contract recited that "the second party (Wattell) agrees to forfeit above-named property as liquidated damages." An extension of time was given on the contract, but defendant failed to make the payments to the plaintiff as required; whereupon this action was brought. We think that specific performance was the appropriate remedy and that plaintiff was not required to resort to an action for damages as her only means of obtaining satisfaction of the obligations assumed by the defendant. (*Shannon v. Cavanaugh*, 12 Cal. App. 434, [107 Pac. 574].)

[2] Appellants insist that the court improperly decreed that the deed from Wattell to the plaintiff should be delivered to the plaintiff to be held as security. They argue that the term of the contract providing that the property should be taken under the deed as for liquidated damages was void for the reason that the case was not such a one as to permit damages to be fixed in advance. We may agree that this was so.

However, assuming that the plaintiff had received the deed, she would have been entitled to retain it as security for the performance of the obligations of the defendant. She could not have claimed the property transferred by defendant absolutely as her own, but would have been required to foreclose in order to subject the lot to the payment of her debt. So here the court properly decreed that the deed should be delivered and held in the same way. The form of the chattel mortgage which the court decreed should be executed by Wattell was precisely in accord, as to the payments to be made, with the contract as expressed in the memorandum agreement and the trust instructions executed by Wattell. The court found against the defendant's claim that there had been fraudulent representations as to the value of the lodging-house, furnishings, and furniture; hence we are not concerned with that question here, as there was sufficient evidence to support those findings. The contract between these parties was poorly expressed and the action taken under it somewhat disconnected. However, on the record before us we cannot perceive wherein justice has miscarried in this case.

The judgment appealed from is affirmed.

[Civ. No. 2471. Second Appellate District, Division One.—March 31, 1919.]

ATANACIO MARTINEZ, Appellant, v. M. D. YANCY,
Respondent.

- [1] **LEASES—ORAL AGREEMENT FOR—POSSESSION OF PREMISES UNDER—BREACH—REMEDIES—MEASURE OF DAMAGES.**—Where a person enters into possession of premises in reliance upon an oral offer by the owner to lease the land to him for a term of years at a given rental, and continues in possession until the end of the first season, at which time the owner refuses to execute a written lease of the property, his remedy (if any exists) is not an action in *quantum meruit* for work done thereunder, since there was no contract under which he could have performed any work, but for a breach of the oral promise made by the owner to make the lease, in which case the measure of damages, as provided by section 3300 of the Civil Code, is the amount which will compensate him for the detriment proximately caused by such breach, or which will be likely to result therefrom.

APPEAL from a judgment of the Superior Court of Kern County. Howard A. Peairs, Judge. Affirmed.

The facts are stated in the opinion of the court.

Allan B. Campbell, Henry R. Holsinger and Campbell & Holsinger for Appellant.

Edward F. Brittan for Respondent.

SHAW, J.—Action in *quantum meruit* for work and labor alleged to have been performed by plaintiff for defendant at his special instance and request.

Judgment, from which plaintiff appeals, followed the granting of defendant's motion for nonsuit made at the close of plaintiff's evidence, which evidence tended to prove that in January, 1915, plaintiff, upon an oral offer made by defendant to lease to him a tract of land for a term of five years at a rental of one-half the crops produced thereon, entered upon and continued in possession thereof until October 12, 1915, at which time defendant refused to execute a written lease of the property. Thereupon plaintiff demanded payment for the work performed during the time he was in possession, to which defendant replied that as compensation he was entitled to and could take one-half of the crops produced during the year.

Appellant insists upon a reversal under the well-recognized rule that where one engaged in the performance of services under a contract is, by the wrongful act of the other party thereto, prevented from completing the work called for, he may treat the contract as at an end and recover in *quantum meruit* for such part performance. (*Hart v. Buckley*, 164 Cal. 160, [128 Pac. 29].) As stated by Greenleaf on Evidence, volume 2, section 104, one may avail himself of an action upon *quantum meruit* "where the contract, though partly performed, has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant." It thus appears the rule is predicated upon the existence of a contract pursuant to the terms of which and prior to the extinguishment thereof the work has been done. In the instant case, however, plaintiff was not in possession of the property under and by virtue of a lease for five years or any lease other than for one year, as to which there was no repu-

diation or interference with his rights by defendant. Since concededly defendant never made a contract leasing the property to plaintiff for five years, there could be nothing done thereunder by plaintiff pursuant to its terms.

The wrong done plaintiff was in the refusal on the part of defendant to execute the lease in accordance with his oral promise in reliance upon which plaintiff entered upon the property and farmed it for one season. Plaintiff's remedy (if any existed) was not an action in *quantum meruit* for work done thereunder, since, as we have seen, there was no contract under which he could have performed any work, but for a breach of the oral promise made by defendant to make the lease, in which case the measure of damages, as provided by section 3300 of the Civil Code, is the amount which would compensate him for the detriment proximately caused by such breach, or which would be likely to result therefrom. This was the theory upon which the trial court granted the motion for nonsuit, and in doing so it did not err.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2643. First Appellate District, Division One.—March 31, 1919.]

A. H. ALCHIAN, Respondent, v. R. W. MACDONALD, Appellant.

[1] **SALES—PAYMENT BY CHECK — RESCISSION — RIGHT TO PROPERTY — CLAIM AND DELIVERY.**—If the purchaser of an automobile from the representative of the owner delivers to such representative his post-dated check, payable to such representative, for the amount of the purchase price, and takes possession of the automobile, but before such check becomes payable redelivers the automobile to the owner and stops payment on the check as to both the owner and the representative, he withdraws the entire consideration for, and works a complete rescission of, the sale as effectually as if the check had been returned to him, and thereafter he has no interest in, or right of possession of, the automobile, and may not maintain an action in claim and delivery therefor.

APPEAL from a judgment of the Superior Court of Fresno County. D. A. Cashin, Judge. Reversed.

The facts are stated in the opinion of the court.

Geo. G. Graham for Appellant.

Harry Sarkisian for Respondent.

WASTE, P. J.—This is an action in claim and delivery for one automobile. The plaintiff had judgment and defendant MacDonald, alone, appeals.

Defendant MacDonald was purchasing an automobile, under contract of sale, from the E. L. Peacock Auto Company of Oakland. He desired to dispose of the car without the fact becoming known to a number of parties to whom he was indebted. He proposed to defendant Haig, and the latter joined him in executing, a plan whereby this might be done, they to divide the profit over and above a specified amount. Thereupon both defendants, representing themselves as owners of the automobile, offered to sell the same to plaintiff, in consideration of the payment of the sum of seven hundred dollars. Upon their agreeing to perfect title in themselves plaintiff delivered to defendant Haig a post-dated check, payable to Haig, for the amount of the purchase price, and took possession of the automobile. Both defendants signed and delivered to plaintiff a bill of sale of the car. Plaintiff's purpose in post-dating his check was, he testified, "in order to find out if it [the automobile] was clean and clear, that is, so I could get clear title to it. If the title did not vest in me I intended to stop payment of the check."

On the day following the delivery of the automobile to plaintiff, defendant Haig, at the request of defendant MacDonald, and as agreed between the two, paid to the real owner of the car, the balance of the purchase price, and received a bill of sale thereto, together with a transfer to himself of the policy of insurance covering the car. He delivered both of these documents to plaintiff.

A disagreement arose between defendants Haig and MacDonald over the matter. MacDonald communicated this fact to plaintiff and asked for a rescission of the sale, and return

of the car, offering to restore the check to plaintiff. Plaintiff prepared and MacDonald signed a document which read as follows:

“Fresno, California, January 31, 1918.

“I, the undersigned, call the sale of one Apperson roadster car, factory No. 15094 canceled to A. H. Alchian and I will send the check of \$700 to him made on Samuel H. Haig, which I also consider void, and I have also taken possession of the same car.

“Signed. R. W. MACDONALD.”

Relying on this signed agreement, which he retained, plaintiff returned the automobile to MacDonald and promised to cancel the check, when it was restored to him. The check was not returned. The plaintiff stopped payment and subsequently brought this action.

MacDonald had in the meantime mortgaged the automobile to a third party, in whose possession it was, and from whom the sheriff took it under the claim and delivery proceedings. The mortgagee made a third party claim to protect against which a bond was given. The mortgagee was not made a party to the action.

[1] The main question to be determined on this appeal is: Was plaintiff entitled to possession of the automobile at the time of the commencement of the action? He had tentatively closed the deal by delivery of a post-dated check “subject to cancellation,” as he so testified, “if I did not get the car.” Five days after giving the check, and eleven days before it became payable, he voluntarily prepared, and took from MacDonald the document canceling the sale to himself, and acknowledging delivery of possession to MacDonald. With his full consent, MacDonald took entire possession of the car.

Ordinarily, stopping payment of a check does not discharge the liability of the maker to the holder. (7 Corpus Juris, par. 429, and cases cited.) But in the present case, Haig, the holder of the check, was merely acting for, and as the agent of, MacDonald. He had entered into a scheme of misrepresentation and concealment for the purpose of assisting the latter in more readily disposing of his interest in the automobile, and became the convenient medium for the roundabout transfer of the title of the car from defendant MacDonald to the plaintiff. The plaintiff was not concerned with any agreement be-

tween the two defendants, looking to a division of the proceeds of the sale. When he redelivered the automobile to one of them, and stopped payment of the check as to both, he withdrew the entire consideration for, and worked a complete rescission of, the sale, as effectually as if the check had been returned by the defendants for cancellation.

The plaintiff did not, at the time of the commencement of the action, have any interest in, or right of possession of, the automobile. He was, therefore, not in a position to commence or maintain it. (*Garcia v. Gunn*, 119 Cal. 315, [51 Pac. 684]; *Fredericks v. Tracy*, 98 Cal. 658, [33 Pac. 750].)

In view of the conclusion we have reached, we do not deem it necessary to pass upon the other points made on this appeal.

The judgment is reversed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 2714. First Appellate District, Division Two.—April 1, 1919.]

J. C. MACFARLAND, Administrator, etc., Appellant, v.
JESSE WALKER et al., Respondents.

- [1] CONVEYANCES — LEGAL AND EQUITABLE INTERESTS — OPERATIVE WORDS.—Where a grantor conveys certain lands, reserving and excepting the subterranean oils and minerals and the right to enter upon the lands to dig, bore, or mine for the same, and takes a mortgage on the lands conveyed to secure the payment of a certain promissory note, the operative words "remise, release and forever quitclaim all my right, title and interest, both in law and equity," are the most apt which he can select to thereafter convey to his grantees both his equitable interest under the mortgage and his legal interest in the minerals and mining rights.
- [2] ID.—GRANT—WHAT WORD INCLUDES.—The word "grant" includes all sorts of conveyances, including quitclaim deeds.
- [3] ID.—CASE AT BAR—CONSTRUCTION OF INSTRUMENT.—In this action to quiet title to certain minerals and mining rights, the operative words "remise, release and forever quitclaim all my right, title and interest, both in law and equity," used by plaintiff's testator, under the surrounding circumstances on making the instrument in question, were given their full significance and not construed merely as a

release of mortgage, notwithstanding such instrument began with the recital "Whereas the said [grantees] are desirous of having their said tract of land relieved from the operation of said mortgage."

- [4] **ACTION TO QUIET TITLE—FINDINGS OF OWNERSHIP—JUDGMENT.**—In an action to quiet title, ultimate findings of the fact of ownership in the defendants and lack of ownership in the plaintiff will support a judgment in favor of the defendants, unless the findings of probative facts are at variance with such finding of ownership.

APPEAL from a judgment of the Superior Court of Humboldt County. George D. Murray, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. C. MacFarland for Appellant.

G. W. Hunter, L. M. Burnell and J. S. Burnell for Respondents.

BRITAIN, J.—The plaintiff appeals on the judgment-roll alone after trial of a suit to quiet title to certain minerals or mineral rights, and the right to enter upon the defendants' lands, there to dig, bore, and mine for the subterranean substances. He maintains the findings do not support the judgment, because he claims all the elements of adverse possession on the part of the defendants do not appear, and because a certain instrument set forth in the findings was, as he urges, merely a release of mortgage and not a conveyance of the minerals and mining rights.

In 1869 the plaintiff's testator, by an attorney in fact, conveyed certain lands in Humboldt County to the predecessors in interest of the respondents by deed in terms a grant, reserving and excepting therefrom the subterranean oils and minerals and the right to enter upon the grantees' lands to dig, bore, or mine for the subterranean minerals, paying to the grantees such damages as they might sustain by reason of such entry. Upon the day the grant was made, the grantees mortgaged to the grantor the land conveyed to secure the payment of a promissory note payable August 31, 1870, for \$1,880, with interest at ten per cent. During the month of August, 1870, before the note became due, the instrument in question was executed. It recites the fact of the making and recordation of the mortgage, giving the book and

page of record, and describes the lands, making no reference to the reservation in the original deed. It further recites that "Whereas the said John Walker and Jesse Walker are desirous of having their said tract of land relieved from the operation of said mortgage; now therefore I . . . in consideration of the premises and of the sum of One Dollar, the receipt whereof is hereby acknowledged, remise, release and forever quitclaim unto the said John Walker and Jesse Walker their heirs, executors, administrators and assigns the aforesaid premises and all the right, title and interest, both in law and equity, which I have in and to the same."

The appellant maintains that by the reservation in the original grant the grantor created two separate and distinct estates in the land, one being of the surface, or soil, and the other of the oil and similar substances below the surface, together with the right to remove them. (*Murray v. Allred*, 100 Tenn. 100, [66 Am. St. Rep. 740, 39 L. R. A. 249, 43 S. W. 355]; *Kincaid v. McGowan*, 88 Ky. 91, [13 L. R. A. 289, 4 S. W. 802].) He argues that the clear intent of the instrument is indicated by the recital, "Whereas the said John Walker and Jesse Walker are desirous of having their said tract of land relieved from the operation of said mortgage," and that "nowhere in the instrument can be found the slightest evidence of intention to reconvey any oil lands."

The case of *Barnstable Sav. Bank v. Barrett*, 122 Mass. 172, relied upon by the appellant, was a case where the operative words indorsed on the back of the mortgage itself were: "Having received full payment and satisfaction of the within mortgage, I do hereby cancel and discharge the same, and release and forever quitclaim unto the within named G., his heirs and assigns, all my right, title and interest in and to the within described premises. To have and to hold," etc. At the time the mortgagee's interest under the mortgage was the only interest he had, although he theretofore had another mortgage on a portion of the land, which he had assigned to one Flagg several months prior to the release. The mortgagee's assignment to Flagg was not seasonably recorded, and to defeat Flagg's interest it was sought to extend the instrument beyond its clear meaning. The court properly held this could not be done.

In *Donlin v. Bradley*, 119 Ill. 412, [10 N. E. 11], immediately after the description of the land in the deed in ques-

tion was the provision: "This deed is made for no other purpose except to release a certain trust deed," describing it. The court held that the deed was limited to the purpose stated.

In *Barr v. Foster*, 25 Colo. 28, [52 Pac. 1101], where the quitclaim deed specifically referred to the interests of the grantors arising out of a certain contract, it was held that it did not release a deed of trust, of which the grantors were the beneficiaries. In each of these cases, the operative words of quitclaim themselves contained a limitation upon the interest conveyed.

The appellant maintains that if the language of the instrument is given its full and most stringent construction, it cannot by any means refer to the oil rights. A serious argument presented by able counsel in support of the two constructions to be given the instrument demonstrates, if not its ambiguity, at least a repugnance between the recital and the operative words. Since the appeal is upon the judgment-roll alone, this court is limited to a consideration of the facts presented by the findings and admitted by the pleadings. The court is confined to those fundamental rules of construction, which all lawyers find so easy to state, and which the reports of adjudicated cases show no two lawyers on opposite sides of a controversy can agree to apply in the same way. The first of these rules is to ascertain the intent of the parties by taking the instrument by the four corners and, if possible, giving effect to every word in it in accordance with its usual meaning. In the Civil Code are codified the rules of interpretation. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. (Civ. Code, sec. 1645.) [1] The operative words in this instrument, "remise, release and forever quitclaim all my right, title and interest, both in law and in equity," whether considered as technical words of conveying or words understood in their ordinary and popular sense, are the most apt which could have been selected to convey to the Walkers both the equitable interest of the mortgagee and the legal interest in the minerals and mining rights. These words standing alone and constituting the entire operative clause of the instrument in themselves are entirely unambiguous. If they had been written without any

recital having been made, there could be no question as to their legal effect. No evidence could have been introduced and no inference drawn to limit them simply to a release of the mortgage. They were not coupled in the operative clause with a limitation to the mortgage interest as were the operative clauses in the Barnstable Savings Bank case, in *Donlin v. Bradley*, and in *Barr v. Foster*, cited by the appellant.

The appellant maintains that notwithstanding the lack of ambiguity in the operative words of the instrument, the intent of the grantor was shown by the recitals in the preamble. If his contention were sound, no matter how broad was the language used, it would not be extended beyond the clear intent of the parties. (Civ. Code, sec. 1648.) It is only when the operative words of grant are doubtful that recourse may be had to its recitals to assist in the construction. (Civ. Code, sec. 1068.) The recitals in an instrument may be operative in the sense that they may bind either or both parties to the truth of the facts stated, or they may be examined for the purpose of resolving an ambiguity in the operative words of the grant itself, but where the words of grant are clear, the recitals cannot be resorted to for the purpose of imparting an ambiguity to the entire instrument by which clear words of grant may be limited in their effect. It may be contended that a quitclaim deed is not a grant and that section 1068 of the Civil Code applies only to technical grants. [2] But the word "grant" includes all sorts of conveyances, including quitclaim deeds. (*Faivre v. Daley*, 93 Cal. 664, [29 Pac. 256].) If several parts of a grant are absolutely irreconcilable, the former part prevails (Civ. Code, sec. 1070), but this section must be read in connection with section 1068, and with section 1069, which provides that it is to be interpreted in favor of the grantee.

[3] Grants are to be interpreted as other contracts (Civ. Code, sec. 1066), and they may be explained by the circumstances under which they were made and the matter to which they relate (Civ. Code, sec. 1647). An examination of the surrounding circumstances in making the instrument in question supports the conclusion that under the rules of construction of the language of the instrument, the operative words must be given their full significance.

The appellant maintains that the external circumstances show the instrument was intended merely as a release. An

examination of all the circumstances before the court gives little support to this contention. Thomas R. Bard, as the attorney in fact of Thomas A. Scott of Philadelphia, in 1869 was authorized to bargain and sell Scott's lands in Humboldt County, to make deeds of quitclaim, special warranty, and general warranty, to accept mortgages, to collect moneys due Scott and to compound the same; to execute and to satisfy of record releases of mortgages and to give acquittances and releases. When the instrument in question was executed under this power, Bard knew that he was authorized to make quitclaim deeds and to release mortgages. He also knew that on the same day the mortgage was made, he reserved what the appellant maintains was a legal estate out of the mortgaged premises, consisting of rights under the surface of the lands mortgaged. He knew, therefore, that his principal had both legal and equitable interests in the lands. The instrument was made before the mortgage debt became due. It is significant that it does not recite the fact of payment of the debt. It does recite that the owners were desirous of having the lands relieved from the operation of the mortgage, and in consideration of that desire, and for a further consideration, Bard used the language necessary to convey both the legal and the equitable interests of his principal. He did not use the language he was expressly authorized to use in the event of the payment of the mortgage debt.

These transactions occurred nearly fifty years ago. The original grant from Scott to the Walkers was made in November, 1869. The instrument in question was made in 1870. Scott lived for twenty-one years after the instrument in question was executed. During that period the Walkers dealt with the property in all respects as their own; deeds between the original grantees and from the original grantees to their successors were executed and recorded, and a few months before Scott's death, successors of one of the Walkers in terms leased to one Graham a portion of the lands included within the original deed for the express purpose of drilling, digging, boring, and removing petroleum, oil, and similar substances therefrom. Scott died in 1891; between that time and 1903 numerous other conveyances and leases of the lands and parts of them were recorded, some of them reserving in the grantors named in these latter conveyances, and others transferring to the grantees named therein, the oil and similar products

with the right to extract the same. All these instruments, some fifteen in number, were matters of public record more than twelve years before the plaintiff was appointed the administrator of the estate of Scott, with the will annexed. His appointment was not until twenty-three years after the death of Scott. The appointment was made in 1914, and this suit was brought shortly thereafter. Notwithstanding the appellant's claim that during this period of half a century Scott and his estate have held an estate in the lands of which they could not be divested by nonuser, that interest in the lands was never assessed, at least before 1909, to either Scott or Scott's estate. The entire interest in the property was assessed to the holders claiming under the instrument in suit, and all taxes were paid by them. Their property was fenced and held by them openly as their own. Even though all the elements of adverse possession of such an estate as the appellant claims do not appear, for the reason that the clock would not begin running until Scott or his representatives were denied the right to exercise the privileges reserved in the original deed, in view of the notice imparted by the recordation of the instruments during a long period of years showing the adverse claims of the Walkers and their successors, coupled with the fact that at the expiration of forty-five years after the instrument in suit was executed, the plaintiff, as the representative of Scott's estate, deemed it necessary to bring a suit to quiet those adverse claims, the principle that equity does not look with favor upon stale claims might well be applied. Whether this principle would be conclusive or not, the dealings of the Walkers and their successors with the land after the execution of the instrument in suit and the silence on the part of Scott and the representatives of his estate in regard to the clouds upon his title, if he still retained title, would indicate that the parties to the instrument had themselves considered the operative words to mean exactly what they say.

[4] Respondent urges that apart from any question of construction of the instrument or of adverse possession, the court made the ultimate findings of fact of ownership in the defendants and lack of ownership in the plaintiff, and that these findings fairly sustain the judgment. This rule directly applies to the present case, unless the findings of the probative facts regarding possession and the construction of

the instrument in suit are at variance with the finding of ownership in the defendants. (*McArthur v. Goodwin*, 173 Cal. 499, [160 Pac. 679].) In support of the construction given to the instrument in suit by the lower court, there may have been additional facts before the lower court not presented by the judgment-roll. Ordinarily the existence of whatever facts might be necessary to support the finding of ownership in such a case would be presumed to have been presented to the lower court in support of its action. Upon the facts before this court, Scott's title was divested in 1870, since which time the defendants and their predecessors in interest have been, as they still are, the owners of the lands in fee.

Judgment is affirmed.

Langdon, P. J., and Haven, J., concurred.

[Civ. No. 2741. First Appellate District, Division Two.—April 1, 1919.]

JAMES EVA ESTATE (a Corporation), Respondent, v.
THE MECCA CO. (a Corporation), Defendant; **OAK-
LAND BREWING AND MALTING CO.** (a Corpora-
tion), Appellant.

- [1] **GUARANTY—SURETY OF LESSEE—CONSTRUCTION OF CODE SECTIONS.**—Sections 594–596, inclusive, of the Political Code are intended to apply exclusively to the conduct of the business of insurance as such, and their provisions cannot be stretched to cover the case of a single contract of guaranty, such as where one person acts as surety upon a bond guaranteeing the faithful performance on the part of a lessee of the covenants of a written lease.
- [2] **CORPORATION LAW—POWERS OF CORPORATION—ULTRA VIRES ACTS—NOTICE.**—Where an act is within the corporate powers for some purposes or under some conditions, the rights of parties who have dealt with the corporation, under the express or implied representation that it is acting with such powers in the making of a particular contract, are entitled to favorable consideration; and in such a case the defense of *ultra vires* is not available unless it is shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying performance.

- [3] **ID.—LIABILITY TO THIRD PARTIES—DEFENSE—DIRECT ATTACK.**—The attempt of a corporation to use the defense of *ultra vires* as a means of escaping its liability to third parties is regarded with much less favor than when a direct attack upon such corporate act is made by a stockholder or by the state.
- [4] **ID.—BURDEN OF PROOF.**—Where the corporate act is within the powers of the corporation for some purposes and is claimed to be without its powers under given circumstances, the burden of proving the latter state of affairs rests upon the corporation denying its liability.
- [5] **ID.—POWER TO EXTEND FINANCIAL AID.**—A corporation organized for the purpose of operating and maintaining the general business of brewing and malting may, in furtherance of its own interests, extend financial aid to its customers.
- [6] **ID.—GENERAL POWER—WANT OF BENEFIT—BURDEN OF PROOF.**—Where it is within the general powers of a corporation to execute a guaranty bond under some circumstances, but such act is *ultra vires* if such corporation receives no direct benefit therefrom, in an action to recover upon such bond, the burden is on the corporation of proving that it received no such benefit.
- [7] **LANDLORD AND TENANT—REBATE IN RENT—EFFECT ON LEASE.**—A rebate, for certain months, made by the lessor to the lessee and to a committee of its creditors, is not sufficient to establish a change in the written lease so as to affect the amount of future installments of rent.
- [8] **ID.—CORPORATION PARTY TO REBATE—ESTOPPEL.**—Where the corporation surety for the lessee, through its vice-president, asked for and consented to such change in the amount of the rent, it cannot be heard to object thereto.

APPEAL from a judgment of the Superior Court of Alameda County. W. M. Conley, Judge Presiding. **Affirmed.**

The facts are stated in the opinion of the court.

Snook & Church for Appellant.

W. B. Rinehart for Respondent.

HAVEN, J.—Action by a lessor for the collection of delinquent rent, against its lessee and two sureties upon a bond guaranteeing the faithful performance on the part of said lessee of the covenants of a written lease. The lessee suffered default and the action was tried as against the sureties

alone. Judgment was rendered against both sureties, from which one of them appeals. The appellant urges three grounds for reversal, which will be considered in the order in which they are made.

[1] It is claimed that the bond executed by appellant is void because "it was entered into contrary to express statutory law, to wit, sections 594-596, inclusive, of the Political Code of the State of California." The sections referred to are found in article XVI of the Political Code, which article by its title and provisions refers to the office of insurance commissioner, the performance of his duties and the transaction of the business of insurance under his supervision. The particular sections relied upon are section 594, subdivision 5, which provides that fidelity and surety insurance includes "... guaranteeing and executing all bonds, undertakings, and contracts of suretyship, and guaranteeing the performance of contracts other than insurance policies," and the closing paragraph of subdivision 6 of section 596, which reads as follows: "All policies and other contracts of insurance, issued without full compliance by all parties concerned with the laws of this state, shall be null and void." Appellant urges that the bond here sued upon comes within the term "other contracts of insurance" found in section 596 as defined in section 594. If such contention is correct, it follows that it is illegal for any corporation to execute in this state any bond guaranteeing the performance of any contract, or even to guarantee the payment of a promissory note, without having first complied with the provisions of the Political Code above referred to, and placed itself under the jurisdiction of the insurance commissioner. In our opinion the code sections relied upon are intended to apply exclusively to the conduct of the business of insurance as such, and their provisions cannot be stretched to cover the case of a single contract of guaranty such as the one involved in this action. We hold, therefore, that said sections have no application to the facts of this case.

[2] It is next contended that the contract sued upon is a mere naked guaranty and is, therefore, *ultra vires* of the purposes and powers of the appellant corporation, and for that reason void. The term "*ultra vires*" when applied to the act of a corporation is used in different senses. It may indicate that the act referred to is entirely beyond the scope

of the powers of the corporation to perform under any circumstances or for any purpose, or, again, the term may be applied to an act of a corporation which may be fully within the scope of the general powers of the corporation for some purposes, but beyond such powers for other purposes. The rights of persons dealing with the corporation vary according as the act is *ultra vires* in one or the other of these senses. When the act is within the corporate powers for some purposes or under some conditions, the rights of parties who have dealt with the corporation, under the express or implied representation that it is acting within such powers in the making of a particular contract are entitled to favorable consideration. In such a case the defense of *ultra vires* is not available unless it be shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. (*Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, at pages 578-588, [99 Am. Dec. 300]; 10 Cyc. 1148, 1149.)

[3] The attempt of a corporation to use the defense of *ultra vires* as a means of escaping its liability to third parties is regarded with much less favor than when a direct attack upon such corporate act is made by a stockholder or by the state. (*McQuaide v. Enterprise Brewing Co.*, 14 Cal. App. 315, [111 Pac. 927].)

[4] It is the further established rule in this state that, in cases where the corporate act is within the powers of the corporation for some purposes and is claimed to be without its powers under given circumstances, the burden of proving the latter state of affairs rests upon the corporation denying its liability. (*Miners' Ditch Co. v. Zellerbach*, 37 Cal., at page 585, [99 Am. Dec. 300]; *Morgan v. Board of Education*, 136 Cal. 245, 247, [68 Pac. 703]; *Brown v. Board of Education*, 103 Cal. 531, 534, [37 Pac. 503].)

[5] With the above principles in mind, we take up the record before us. The plaintiff introduced in evidence its lease, to which the bond sued upon is attached. Accompanying this bond is a certified copy of a resolution duly adopted by the directors of the appellant corporation, wherein it is recited that it is for the best interests of that corporation that the lessee "shall secure the rights and privileges of the said lease under the terms thereof." In its attempt to prove that

the execution of this bond was beyond its corporate powers, appellant introduced in evidence its articles of incorporation. These provide that the purpose of the corporation is to operate and maintain the general business of brewing and malting. Under such general powers a corporation may, in furtherance of its own interests, extend financial aid to its customers. (*Armour & Co. v. Rosenberg & Sons Co.*, 36 Cal. App. 773, [173 Pac. 404].)

[6] It is conceded by appellant that if a corporation derives a direct and substantial benefit from the making of a contract of the character of the one here involved, "then the contract will be considered to be *intra vires*, or possibly if *ultra vires*, that the corporation will be estopped to set up that defense." In other words, it is admitted that the execution of a guaranty of this character might, under some circumstances, be within the corporate powers of appellant. The case falls, therefore, directly within the principles of law above referred to. The execution of the bond was not beyond the powers of the corporation under all circumstances or for all purposes. In order to sustain the defense that its execution under the circumstances of this case was beyond such powers, it was incumbent upon appellant to show that it received no direct benefit therefrom. An examination of the record discloses no evidence of that character. On the contrary, it appears that the appellant was a creditor of the lessee at the time the delinquent rent sued for accrued, upon a merchandise and cash loan account. There is no direct evidence, however, that this relation existed at the time the bond was executed, nor that the purchase of merchandise from appellant was a condition for the execution of such bond. It is unnecessary to determine whether or not this is sufficient proof of the receipt of a direct benefit by the appellant corporation. The appellant did not prove that no such benefit was received by it. The burden of proof as to that matter being upon appellant, it cannot be held that the contract was *ultra vires* of the powers of the corporation.

[7] The final contention of appellant is that the guarantor was discharged from liability for the reason that the principal obligation of the lessee was changed and altered in a material respect without the consent of the guarantor. The change in the principal obligation relied upon is the fact that the lessor made a rebate, for certain months, from the amount

of rent specified in the lease, to the lessee and to a committee of its creditors. To this contention there are three answers: (1) No such defense was pleaded by the defendant. (2) Concessions of this kind are not sufficient to establish a change in the written contract so as to affect the amount of future installments of rent. (*Sinnige v. Oswald*, 170 Cal. 55, 57, [148 Pac. 203].) (3) Part of these concessions of rent were made to the committee of creditors, of whom Mr. Wieking, the vice-president of the appellant corporation, was one. He was called as a witness and asked by the court whether or not the arrangement of a rebate of \$150 on the \$450 monthly rent was satisfactory to him. He stated that it was, and the only objection he had to the rebate was that it was not as large as he had sought to obtain. [8] The appellant corporation, through its vice-president, having asked for and consented to this change in the amount of rent, cannot be heard to object thereto.

In our opinion none of the contentions of appellant is well founded. The judgment is therefore affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on May 29, 1919, and the following opinion then rendered thereon:

THE COURT.—In view of the circumstances disclosed by the evidence in this case, including the recital in the resolution adopted by the directors of the appellant corporation to the effect that it is for the best interests of the corporation that the lessee shall secure the rights and privileges of the lease, we are satisfied that there was a sufficient showing of benefit to appellant corporation to make its undertaking valid. We express no opinion on the question of burden of proof discussed in the opinion.

The application for a hearing in this matter after decision by the district court of appeal of the first appellate district, Division Two, is denied.

All the Justices concurred, except Wilbur, J., who was absent.

[Civ. No. 2646. First Appellate District, Division One.—April 1, 1919.]

I. L. CAVASSO, Respondent, v. J. C. DOWNEY, Appellant.

[1] **PROMISSORY NOTE—CONSIDERATION—ACTION AGAINST MAKER—VIOLATION OF COVENANT RUNNING TO THIRD PARTY.**—In an action on a promissory note executed by the defendant to the plaintiff as part consideration for plaintiff's interest in a certain corporation as represented by certain shares of stock held by him therein, which was purchased by defendant under an agreement whereby plaintiff bound himself not to engage in any business in competition with such corporation for a period of five years, plaintiff's violation of such clause was not a matter which could be made the subject of a cross-complaint by the defendant.

APPEAL from a judgment of the Superior Court of Alameda County. Wm. M. Conley, Judge Presiding. **Affirmed.**

The facts are stated in the opinion of the court.

Edward R. Eliassen for Appellant.

M. J. Rutherford for Respondent.

RICHARDS, J.—This is an appeal from a judgment in favor of plaintiff for the sum of one thousand dollars, with interest and costs of suit, in an action to recover upon a promissory note executed by the defendant to the plaintiff for said sum. The defendant in his answer admitted the execution of the note, but denied that the same had not been paid. He further averred that the consideration of the note had failed. He then proceeded to aver that the said plaintiff and himself had for some time prior to the making of said note been engaged in business as partners under the firm name of Downey-Cavasso Glass and Paint Co., doing business in the city of Oakland; that on or about October 31, 1914, the plaintiff had sold all of his right, title, and interest in said business and the goodwill thereof to the defendant upon the express understanding and agreement that the said plaintiff would not engage in any business in competition with the said defendant within the city of Oakland for the period of five years; that the making of such agreement was part consideration for the purchase by the defendant of the plaintiff's in-

terest in said firm and for the execution of said promissory note as a portion of the purchase price thereof; that in violation of said agreement the said plaintiff did engage in the same kind of business within said city of Oakland in competition with the said defendant, which acts on his part were fraudulent, and worked a failure of consideration for the note sued upon in this action. The defendant also presents the same facts in a cross-complaint, wherein he prays for an injunction preventing the plaintiff from continuing in business in competition with the cross-complainant, and for a decree requiring said plaintiff to deliver up said note for cancellation. The defendant has also a so-called cross-complaint for the recovery from plaintiff of the sum of \$603.98 upon an assigned claim.

Upon the trial of the cause, evidence was presented before the court showing that for some time prior to the thirteenth day of January, 1913, the plaintiff and the defendant had been copartners conducting a glass and paint business in the city of Oakland under the firm name of Downey-Cavasso Glass and Paint Company; but that on or about the last-named date a corporation had been formed by them with the same name and to which corporation they proceeded to transfer their and each of their interest in said business and in all of the properties thereof, each receiving therefor 380 shares of the capital stock of said corporation; that said corporation took over said business, and from time to time during the next year and a half or more held occasional directors' meetings in respect to the affairs of the business; that in the month of October, 1914, the plaintiff and the defendant entered into a written agreement by the terms of which it was recited that the parties thereto were stockholders in the aforesaid corporation, and that defendant was desirous of buying and the plaintiff of selling all of the latter's interest in the business thereof. It was therefore agreed that the defendant was to pay the sum of six thousand dollars for all of the interest of the plaintiff in the said corporation and business, "the said interest being represented by 380 shares of the capital stock of said corporation," which the plaintiff agreed for said consideration to transfer to the defendant. The note in question was a part of said consideration. The closing clause in said agreement reads as follows: "It is further agreed by and between the parties hereto that the said party

of the second part [plaintiff herein] will not engage in any business in competition with the Downey-Cavasso Glass and Paint Company for a period of five years from the date hereof." It further appeared upon the trial that a short time after the execution of said agreement the plaintiff did engage in business in the city of Oakland and in direct competition with said Downey-Cavasso Glass and Paint Company. The trial court decided upon the whole evidence presented that the copartnership which had previously existed between the parties had been merged in the corporation formed in the month of January, 1913, and that the relation of copartners in respect to the business then taken over by such corporation did not continue thereafter, and that the transaction between the parties in October, 1914, was one in which the defendant purchased the stock of the plaintiff in said corporation, giving among other things the note in question as a part of the consideration therefor. We are satisfied from a reading of the record that the evidence fully justifies the findings of the court in this regard. The court further found that the plaintiff did embark in business in the city of Oakland in competition with the said corporation, but not in competition with the defendant, who, since the organization of said corporation had not been engaged in such business on his own account. The court also upon sufficient evidence found against the defendant on his cross-complaint, and accordingly rendered judgment in the plaintiff's favor.

[1] We find no error in the court's conclusions with respect to these matters. The evidence, as we have seen, justified the finding of the trial court that the partnership between the parties hereto ceased when the corporation was organized, and also justifies the finding that the transaction between the parties was one for the purchase by the defendant of the plaintiff's interest in said corporation as represented by the 380 shares of stock held by him therein. If these findings be upheld, it follows necessarily that the plaintiff's violation of the clause in said agreement by which he bound himself not to engage in business in competition with the Downey-Cavasso Glass and Paint Company, a corporation, was a matter which could not be made the subject of a cross-complaint by the defendant in this action. This conclusion assumes the validity of the clause in question as an agreement in restraint of trade. It is urged by the respond-

ent that this part of the agreement, not being by its terms limited as to the territory embraced in its operation, is void as contrary to the provisions of sections 1673 and 1674 of the Civil Code, citing *Callahan v. Donnolly*, 45 Cal. 152, [13 Am. Rep. 172], as authority for such contention. We do not, however, deem it necessary to dispose of this contention in view of our conclusions upon the other phases of the case.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2200. First Appellate District, Division One.—April 2, 1919.]

RAUER'S LAW & COLLECTION CO. INC., Appellant, v. SHERIDAN PROCTOR CO., Respondent.

- [1] **JUDGMENTS—TENDER OF PAYMENT—DEPOSIT WITH CLERK—INTEREST—SATISFACTION.**—A deposit with the clerk of the court of the amount of a judgment and notification to the judgment creditor that the same is there subject to its demand does not constitute a legal tender; and even if it did constitute a legal tender, it would be unavailing to satisfy the judgment where a small amount of interest on the judgment is not included.
- [2] **TENDER—AMOUNT.**—Nothing short of the full amount due the creditor is sufficient to constitute a legal tender, and the debtor must at his peril offer the full amount.
- [3] **PLEADING—COUNTERCLAIM—RES JUDICATA.**—In an action to recover the purchase price of certain personal property sold and delivered, the contention that one of the causes of action set up as a counterclaim had been adjudicated in a former action is not tenable, where such counterclaim, although pleaded in such former action, did not exist at the time of the commencement thereof, but matured some months later, and, therefore, was not adjudicated in that case.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Affirmed.

The facts are stated in the opinion of the court.

Wm. Tomsy for Appellant.

W. H. Barrows for Respondent.

KERRIGAN, J.—This is an appeal by plaintiff from a judgment rendered in its favor for the sum of \$49.32. The action was brought to recover \$312.50 as the agreed price of certain personal property sold and delivered by the plaintiff's assignor, the Eastern Outfitting Company, to the defendant, Sheridan Proctor Company. In its answer, said defendant admitted the indebtedness pleaded in the complaint, but set up as a counterclaim a judgment in its favor against the plaintiff's assignor of \$15, and a demand for \$247, the price of storage of certain furniture.

The appeal presents but two questions. [1] As to the first of these it appears that prior to the commencement of this action the plaintiff, in an attempt to satisfy a former judgment of \$15 in favor of the defendant, deposited that sum with the clerk of the court, notifying the defendant that the same was there subject to its demand. Such a deposit and notice alone certainly did not constitute a legal tender, and even if it had it would have been unavailing for the reason that a small sum for interest upon the judgment had accrued, which was not included in the amount deposited. [2] Nothing short of the full amount due the creditor is sufficient to constitute a valid tender, and the debtor must at his peril offer the full amount. (38 Cyc. 137.)

[3] Respecting the other point, plaintiff asserts that the claim for storage constituting defendant's second cause of counterclaim had been adjudicated in a former action. It is true that this matter was pleaded by the defendant by way of a counterclaim in a former action between it and the plaintiff's assignor; but it also appears from the record that such counterclaim did not exist at the time that action was commenced, but that it matured some months later. It is apparent that it was not pressed in the first action for the simple reason that it was not an existing demand at the time the action was commenced. (Code Civ. Proc., sec. 438, subd. 2; *Wood v. Brush*, 72 Cal. 224, [13 Pac. 627]; *McGuire v. Edsall*, 14 Mont. 359, [36 Pac. 453]), and therefore was not adjudicated in that case. Moreover, no evidence was introduced by the plaintiff in the present action that the subject of the

defendant's counterclaim was *res adjudicata*, the only reference to it occurring in the cross-examination of a witness. In order to debar defendant's right to recover in this action on its counterclaim, it was necessary for the plaintiff to show that the matter had been theretofore adjudicated, which, as we have said, was not done.

The judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Civ. No. 1927. Third Appellate District.—April 2, 1919.]

THE TRUCKEE RIVER GENERAL ELECTRIC COMPANY (a Corporation), Appellant, v. JOHN ANDERSON et al., Defendants; DUANE L. BLISS, Jr., et al., Respondents.

- [1] ADVERSE POSSESSION—ESSENTIALS—CONSTRUCTION OF CODE.—For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, it is not necessary, under section 325 of the Code of Civil Procedure, that the land shall have been "protected by a substantial inclosure" or "usually cultivated or improved" for any specific period of time, but only that it shall have been occupied and claimed and the taxes paid for the period of five years continuously.
- [2] ID.—RECOVERY OF POSSESSION OF REAL PROPERTY—STATUTE OF LIMITATIONS.—An action for the recovery of the possession of real property is barred by section 318 of the Code of Civil Procedure where neither the plaintiff nor its predecessor "was seised or possessed of the property in question, within five years before the commencement of the action."

APPEAL from a judgment of the Superior Court of Placer County. William M. Finch, Judge. Affirmed.

The facts are stated in the opinion of the court.

John W. Preston and Ed. F. Jared for Appellant.

Raglan Tuttle, Tuttle & Tuttle, W. J. Prewett and Prewett & Chamberlain for Respondents.

HART, J.—Plaintiff commenced the action against John Anderson and a number of others to quiet its title to a tract of land in Placer County, containing about fifty-four acres. As to all of the defendants except Bliss and Ferris the action was either dismissed by plaintiff or default was taken against them for failure to appear. The decree of the court was in favor of plaintiff for all the land mentioned in the complaint, except that defendant Bliss was found to be the owner of a parcel thereof amounting to about one-fifth of an acre and defendant Ferris of a parcel thereof amounting to about seven-eighths of an acre.

It is stated in appellant's brief: "During the pendency of the action, the rights of the plaintiff were acquired by the United States of America, and this appeal is now prosecuted by the government."

The land in controversy is situated on Lake Tahoe and along the bank of the Truckee River near its source, which, throughout the record and in the briefs is spoken of as the "mouth of the Truckee River."

Each of the defendants, Bliss and Ferris, claimed title by adverse possession. The findings of the court were in their favor, and it was also found that the action against defendant Bliss was barred by the provisions of section 318 of the Code of Civil Procedure.

There was documentary evidence received tending to prove title in the plaintiff corporation to the fifty-four acres, which included the two parcels awarded to Bliss and Ferris, the inception of said title being a patent from the United States to Central Pacific Railroad Company, dated April 18, 1870.

THE FERRIS TITLE.

C. B. Ferris testified that he had been living on the property claimed by him since 1896. The tract has a frontage of about 150 feet on the lake front, and it runs back from the lake about eighty feet. The witness testified: "The improvements on the property are a house and a boat-house and a small garage on the hill above the house, and I have a wharf, a boat landing. The property that would be between the house and boat-house and wharf and the county road, I have used for a little of everything; piling wood, lumber, and whatever became necessary to put in there. . . . below the wharf I have a toilet and outhouse. The toilet is probably

forty feet from my southwest line, and the ground in that distance I have used for a little of everything—storage, hauling boats, boat repairing.” The witness built a fence around the property, either in 1907 or 1908—he was pretty positive it was in June, 1908—and it has been maintained ever since. He stated that he had resided continuously on the property, winter and summer.

It was stipulated at the trial that for the years 1908 to 1912, both inclusive, the taxes on the whole property were assessed to and paid by appellant, and that the parcel claimed by Ferris was assessed to him and the taxes were paid by him, during the same period of time.

It is contended by appellant that as Ferris did not occupy the land under color of title but was a mere squatter, he would be subject to the provisions of section 325 of the Code of Civil Procedure, and must prove that the land “has been protected by substantial inclosure,” and “has been usually cultivated or improved,” and it is claimed that neither of these requirements has been met.

The complaint was filed on October 3, 1912, which was four years and four months after the construction of the fence in June, 1908.

Section 325 of the Code of Civil Procedure, as enacted in 1872, read as follows: “For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

- “1. Where it has been protected by a substantial inclosure;
- “2. Where it has been usually cultivated or improved.”

In 1878 (Stats. 1877-78, p. 99), the section was amended by re-enacting the above language and adding thereto the following: “Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land.”

[1] It will be noted that, as originally enacted, there was no provision in the section that the land in dispute should

have been (1) "protected by a substantial inclosure," or (2) "usually cultivated or improved" for any period of time, nor did the amendment change those terms of the section. The five-year period provided by the amendment applies only to the occupancy and claim of the land and to the payment of taxes.

In *Gray v. Walker*, 157 Cal. 381, [108 Pac. 278], our supreme court said: "The requirement of the statute that the land be 'usually cultivated or improved' means that it should be cultivated or improved in the manner or to the extent usual in the case of similar property. (*Allen v. McKay*, 120 Cal. 322, [52 Pac. 828].) If so improved, it is not necessary that it should be either cultivated or inclosed. (*Daniels v. Gualala M. Co.*, 77 Cal. 300, [19 Pac. 519].)" In the case of *Allen v. McKay*, above cited, it was held that an instruction was properly given which stated that: "A piece of property is said to be usually improved, or improved in the usual manner, when it is improved as similar property is improved," and in the *Daniels* case it was held that the right of way of a railroad company, "improved in the usual manner of railroads with reference to their roadbed and right of way," constituted adverse possession, "though the land was not protected on all sides by a substantial inclosure."

Inasmuch as section 325 does not require that the land should be inclosed for the period of five years before the commencement of the action, testimony tending to show that it was inclosed for a shorter period will be admitted as a fact tending to show possession.

As it was stipulated that defendant Ferris, for a period of five years prior to the commencement of the action, had paid the taxes assessed against the parcel of land claimed by him, and in view of the testimony showing acts of possession on his part, we conclude that the judgment in his favor should be affirmed.

THE BLISS TITLE.

In 1879 or 1880, one John Branch, a fisherman on Lake Tahoe, squatted on the property claimed by defendant Bliss, and built a house upon it. He lived upon it until 1900. In 1881 or 1882 he built a fence with cedar posts around the tract "for the purpose of having a garden; he only kept his garden two or three years; the ground was not very good"—as testified by a witness. There was also a wood-shed and a

boat-house built upon the property. The place was commonly known in the neighborhood as "The Johnnie Branch Place," and was reputed to be his property. Branch died some time between 1900 and 1904.

In 1900, J. H. Pomin bought from Branch the house and his boats—"everything he had—lot and house," Pomin testified. This transaction was evidenced by the following document, which was admitted in evidence over plaintiff's objection:

"This is to certify that I, Jno. Branch, do this third day of August, 1900, for the sum of one hundred and fifty (\$150.00) dollars, which money has been paid me this day, and in consideration of which sum, I do transfer and sell to J. H. Pomin all right, title and interest in the house-boats, fixtures and whatsoever property is contained in said building or buildings on lot occupied by said buildings. The said property being located at the mouth of the Truckee River (West bank). This includes each and all property of whatsoever description formerly owned by me, (Jno. Branch).

"Witness my signature.

"(Signed) JOHN BRANCH.

"Witness: H. W. WILLS.

"Tahoe City, Cal., August 3d, 1900."

On the fourteenth day of November, 1912, H. W. Wills went before a notary public and acknowledged that John Branch had signed and executed said instrument.

Pomin testified that when he bought the place he had it rented for a couple of years; that the renter came on the place in 1901 or 1902 and stayed during one summer; that it was vacant for three or four years.

W. S. Bliss, a civil engineer, made a survey of the Branch property for his brother, the defendant Bliss, in 1907 or 1908, seven or eight years before the trial. He stated that he followed the outside boundaries of the land as shown by the old fence; that there was a fence there but he did not know whether it was all standing or not.

The defendant, Duane L. Bliss, Jr., was sworn as a witness and identified a deed, executed June 13, 1907, and acknowledged June 20, 1907, by J. H. Pomin, which conveyed to the witness "Lot known as the John Branch property, County of Placer, State of California, located at the mouth of the Truckee river, west bank, together with the buildings on said

lot and all fixtures or contents therein." Over the objection of the plaintiff, this deed was admitted in evidence.

The witness testified: "At the date of this deed I was living at Tahoe. I personally took possession of this property, and had an Italian carpenter that worked at the Tavern. He and his family lived there; paid me five dollars a month. I haven't any way of getting the exact record of when he went into that property, but some time during the summer of 1907. He was there five or six or eight months. I think the next winter after he went in, after he ceased to occupy it, William Gifford occupied it in the spring of 1908. Gifford occupied it as a tenant. He or his people continued there until this spring. [The trial was had on October 18, 1915.] It was April, I believe, when he was ejected. I brought a suit in ejectment or unlawful detainer. During the time I have been in possession of this property, either by myself or through my tenants, I have always claimed it as my own absolutely. There has never been any interruption of my occupation or possession of it. I have paid the taxes upon the property ever since I have had it."

Tax receipts, showing the payment of taxes by the witness for the years 1908 to 1912, both inclusive, were received in evidence. The assessment for the year 1908 was for "Lot Tahoe." For 1909, 1910, 1911, and 1912, the assessment was for "Lot at Mouth of Truckee River." In the last two receipts there is also included another lot owned by Mr. Bliss. He testified that during the time covered by the first three receipts the lot in question was the only property he owned at Tahoe.

It was shown by the assessment-roll of Placer County that, in 1907 and 1908, the fifty-four acres, together with dam and water rights, were assessed to M. F. Vandall, the grantor of the plaintiff. In the years 1909, 1910, 1911, and 1912, the property was assessed to the plaintiff, reference to the dam and water rights being omitted from the assessments of 1911 and 1912. The property claimed by defendant Bliss is a portion of lot 9 of section 7, township 15 north, range 17 east, and the government plat shows that the lot contained 17.38 acres and that it is situated in the northwest quarter of the northeast quarter of said section 7. The assessment to plaintiff and its grantor in the above-named years, so far as the

property in dispute is concerned, covered "The fractional N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 7," etc.

[2] Section 318 of the Code of Civil Procedure reads as follows: "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action."

A similar statute of Minnesota was considered in *Seymour v. Carli*, 31 Minn. 81, 16 N. W. 495, and the court said: "The title of the owner of a freehold estate is described by the terms 'seizin,' or 'seizin in fee'; yet in a proper legal sense the holder of the legal title is not seised until he is fully vested with the possession, actual or constructive. When there is no adverse possession the title draws to it the possession. . . . An actual possession in hostility to the true owner works a disseizin, and if the disseizor is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished."

The facts in this case, as above detailed, show that it was impossible that plaintiff could have been "seised or possessed of the property in question, within five years before the commencement of the action," and sustain the finding of the court below that plaintiff's cause of action is barred by the provisions of said section. Consequently, it becomes unnecessary to consider the points raised by appellant in its attack upon the judgment.

The judgment is affirmed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 1928: Third Appellate District.—April 2, 1919.]

BRIDGET GIANELLI, as Administratrix, etc., Respondent,
v. MICHAEL BRISCOE, Appellant.

[1] APPEAL—DISSOLUTION OF PARTNERSHIP—INTERLOCUTORY DECREE—

In an action for the dissolution of a partnership and for a partnership accounting, a decree determining that a partnership had existed prior to the time the defendant had breached the partnership

agreement and that plaintiff is entitled to a decree dissolving the partnership, to an accounting from the defendant of all the profits thereof since the breach, and to have all the property of the partnership, including the goodwill thereof, sold and the proceeds equally divided between them, but leaving for future determination and adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership which were received by the defendant and converted by him to his own exclusive use, is merely an interlocutory decree from which an appeal will not lie.

- [2] **JUDGMENTS—WHEN FINAL.**—A judgment is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

APPEAL from a judgment of the Superior Court of San Joaquin County. D. M. Young, Judge.

The facts are stated in the opinion of the court.

A. H. Ashley for Appellant.

A. H. Carpenter for Respondent.

HART, J.—The pleadings disclose that there is a dispute between the parties as to whether or not, for about fourteen years, there was a partnership existing in the saloon business in the city of Stockton, between Andrew Gianelli, plaintiff's intestate, who commenced the action, and the defendant.

The complaint was filed on October 16, 1916; it was alleged that a partnership between the parties was formed in April, 1902; that it existed until July 2, 1916, at which time defendant took exclusive possession of the partnership property and has prevented plaintiff from having access thereto, and retains the income derived from said business. The prayer of the complaint was that said partnership be dissolved; that a receiver be appointed to take possession of the partnership property; that defendant be ordered to account to plaintiff for all moneys and property received by him, in running said partnership, since the second day of October, 1912; that plaintiff's share thereof be paid to him by the receiver out of the proceeds realized from the sale of the property and for judgment against defendant for any deficiency.

On April 16, 1917, the trial court caused to be filed an "Interlocutory Decree," the material portions of which are as follows: "This cause came regularly on for trial upon certain preliminary questions as to whether a partnership existed between plaintiff and defendant, and whether plaintiff was entitled to a dissolution of the same, and to an accounting thereof, on the 5th day of December, 1915, before the court sitting without a jury." It was then stated that evidence was introduced and the matter was submitted to the court for decision; "and all and singular the law and the premises being understood and considered, the court makes and renders its interlocutory decree herein as follows: ' . .

"That from the date of the aforesaid agreement of partnership up to the 2nd day of July, 1916, both plaintiff and defendant observed and carried out the terms and conditions of said agreement, when on the date last named the defendant, in violation of the terms and conditions of said agreement of partnership, took exclusive and adverse possession of said entire saloon business and all the property thereof, including all the proceeds and profits thereof since the 2nd day of July, 1916, and converted the same to his own use, and thereby deprived plaintiff of his right thereto.

"The plaintiff is entitled to a decree dissolving the aforesaid partnership and to an accounting from defendant of all the profits thereof since the 2nd day of July, 1916, and to have all the property of said partnership, including the good will thereof, sold, and to have all the proceeds of such sale and the net amount of all moneys received by said defendant from said partnership business since the said 2nd day of July, 1916, as may appear by said accounting, equally divided between him and said defendant, and the defendant is hereby directed to render such account within 30 days from date hereof.

"It is further ordered that upon the rendition of said account and a satisfactory settlement and division of the proceeds thereof, and after a legal and proper sale of all the said partnership property and a satisfactory division of the proceeds thereof, as herein provided, the same be reported to this court for approval and confirmation."

Other than what might be regarded as such in the decree, the court made no findings.

Defendant appeals from the judgment under the alternative method.

The first proposition submitted for consideration is that the decree is merely interlocutory, and that, therefore, no appeal lies therefrom. Upon that ground the respondent insists that the appeal should be dismissed. On the other hand, the appellant contends that since, as is the claim, all the vital issues in controversy are adjudicated by the decree, the same is final.

[1] It is not claimed that if the decree from which the appeal is taken is interlocutory, it is one from which an appeal will lie. Nor in that case could any such claim be sustained, inasmuch as it is not among those interlocutory orders or decrees from which an appeal is authorized to be taken by section 963 of the Code of Civil Procedure. (*Illinois Trust & Sav. Bank v. Alvord*, 99 Cal. 407, 410, [33 Pac. 1132].) And we think the decree appealed from is merely interlocutory and not a final judgment. It will be observed that it leaves for future determination and adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership from the second day of July, 1916, which, it is stated in the decree, were received by the defendant and converted by him to his own exclusive use. It is, therefore, still necessary, before a final judgment can be rendered, that the amount of such proceeds and profits shall be ascertained by the accounting which was ordered and the same determined and adjudicated by the court upon a consideration of the report of the account of said proceeds to be rendered and returned by the defendant within thirty days from the date of the rendition and entry of the decree.

It is true that the language of the last paragraph of the decree contemplates that the parties themselves may agree to a settlement, in which case all that would remain to be done would be the approval and confirmation of the same by the court upon a report to it of such settlement. And the appellant takes the position that this is all that can be done or that no more is left to be done except to confirm such report as may be made and to enforce by execution the decree already made. But the position is founded on a precarious or indefinite premise, viz., that there will be arrived at between the parties litigant a satisfactory agreement as to the profits withheld from the plaintiff and the division thereof, but the assumption that such will be the result of the accounting conducted by the parties themselves cannot be granted. It

is possible, if, indeed (in view of the hostile feeling which would in such a controversy as this naturally arise between the opposing litigants), not probable, that a satisfactory or any settlement cannot be agreed upon between the parties themselves and thus the controversy finally settled. In that case, the court would, of course, be compelled to take evidence and make findings as to the several vital matters necessarily involved in the question of profits retained and converted by the defendant and the division thereof and thereupon render judgment accordingly. It would, in such case, have to be ascertained and determined by the court how much, if any, of the profits of the business that the defendant received into his possession of which he had made no account to the plaintiff or which he had wrongfully appropriated to his sole and exclusive use. It is, however, not material to inquire whether a satisfactory arrangement or agreement might be reached between the parties themselves so as to leave nothing remaining for the court to do but to confirm the findings contained in the report of their accounting and see that the judgment is then executed. The important proposition is, as above stated, that there are vital matters which the decree appealed from does not adjudicate, but which are left for future determination and adjudication by a judgment or decree from which it would not be seriously contended that an appeal would not lie, since, unlike the decree already entered herein, it would involve a full complete, and definitive adjudication of all the essential questions in the action.

[2] A judgment is final only "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." (*Klever v. Seawell*, 65 Fed. 373, [12 C. C. A. 653]; *Express Co.'s Case*, 108 U. S. 24, [27 L. Ed. 638, 2 Sup. Ct. Rep. 6, see, also, Rose's U. S. Notes]; *Griffin v. Orman*, 9 Fla. 22; *In re Smith*, 98 Cal. 636, 640, [33 Pac. 744]; *Doudell v. Shoo*, 159 Cal. 448, 453, [114 Pac. 579].) In the last-named case it is said: "Our system of procedure contemplates that there shall be but one final judgment in a case (citing cases), and in the absence of a clear showing, it is not to be presumed that the court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matter in controversy."

In the case of *Clark v. Dunnam*, 46 Cal. 204 (cited by appellant), involving an action for the dissolution of a copartnership, the court below made specific findings as to all the assets and indebtedness of the firm, and entered a decree whereby a sale of the partnership property and effects were to be made, and directed the payment of all the debts of the partnership and a distribution of whatever might remain of the proceeds of the sale amongst the copartners in certain proportions which were fixed by the decree. The supreme court entertained an appeal from the judgment in that case, holding it to be a final judgment, because all the essential matters in controversy were thereby fully and completely adjudicated. There was nothing remaining to be done but to enforce by execution what had been determined by the judgment. The litigation between the parties on the merits was thus terminated. And if, in this case, the court had ascertained and determined the amount of the profits of the business which the decree declares were received and converted by the defendant, and so have determined how much thereof the plaintiff was entitled to, we would, of course, have a case here to which the case of *Clark v. Dunnam* would be in all respects analogous, but manifestly that case is not like this and is, therefore, not in point. The other cases cited by the appellant are not similar to this and consequently are of no assistance to him.

Our conclusion is that an appeal does not lie from the decree here, and the appeal therefrom is, therefore, hereby dismissed.

Buck, P. J., *pro tem.*, and Burnett, J., concurred.

[Civ. No. 2709. First Appellate District, Division Two.—April 3, 1919.]

DELIA MILEKOVICH, Respondent, v. PATRICK P. QUINN et al., Appellants.

[1] DIVORCE—DIVISION OF COMMUNITY PROPERTY—DUTY OF COURT.—If the parties to a divorce proceeding have not agreed to a division of the community property, it is the duty of the court in which the divorce proceeding is pending to determine the relative interests of the spouses in their common accumulation.

- [2] **ID.—STIPULATION OF PARTIES—FRAUDULENT CONCEALMENT OF PROPERTY—SUBSEQUENT ACTION TO SECURE PROPERTY—DUTY OF PLAINTIFF—EQUITY.**—Where the husband in entering into a stipulation with reference to the division of the community property fraudulently keeps from the wife knowledge of the existence of certain community property, in a subsequent action by the wife to secure a division of such property, it is not necessary for her to offer to return to the defendant the property received by her under the original settlement; nor is it necessary in such action that the decree in the previous action of divorce be set aside, either in whole or in part.
- [3] **ID.—UNTRUE STATEMENTS OF HUSBAND—MANNER OF MAKING IMMATERIAL.**—The fact that the only untrue statements made by the husband were contained in his pleading and in his affidavit filed in the wife's suit for divorce is immaterial where the wife was deceived thereby and was induced by such false statements to enter into the stipulation covering the division of the community property.
- [4] **ID.—STIPULATION — JUDGMENT — ISSUES WITHDRAWN.**—Where the stipulation with reference to the division of the community property expressly provided that the property rights of the parties as therein set forth should be incorporated in the judgment, and the judgment expressly incorporated them, these matters were as effectually withdrawn from any judicial consideration as if they had been expressly withdrawn by stipulation.
- [5] **ID.—FAILURE TO CROSS-EXAMINE—LACK OF DILIGENCE—SUBSEQUENT SUIT.**—Where, due to the fraudulent misrepresentations of the defendant in his pleading in the divorce action and to his having thereby secured from plaintiff a stipulation covering the settlement of their property interests, the plaintiff fails to cross-examine the defendant as to the community property, she is not thereby guilty of such negligence or lack of diligence as to bar her in a subsequent action from securing her proper share of the former community property.

APPEAL from a judgment of the City and County of San Francisco. Thos. F. Graham, Judge. Affirmed.

The facts are stated in the opinion of the court.

John L. McNab, Timothy Healy and Byron Coleman for Appellants.

Frank W. Sawyer for Respondent.

LANGDON, P. J.—Plaintiff and respondent in her suit sought to be relieved of that portion of a prior decree of divorce by which the property rights of the parties to the

divorce suit are claimed by the appellants to have been finally adjudicated. The essential facts are admitted. In the interim between the divorce decree and the commencement of this action the plaintiff had remarried. When the divorce action was brought, a restraining order was made on the *ex parte* application of the plaintiff prohibiting the defendant in the divorce action, Patrick P. Quinn, from disposing of any portion of the community property. On the following day, Quinn, upon an *ex parte* application, caused the restraining order to be set aside. Immediately thereafter he withdrew from his safe deposit box bonds of the par value of forty-five thousand dollars and delivered them to one Brady for the purpose of secreting them from the knowledge of Mrs. Quinn, her attorneys, and the court in which the divorce action was pending.

In her complaint for divorce the plaintiff made allegations concerning the community property and among other things, upon information and belief, that the defendant had securities of the value of sixty thousand dollars, a part of the community property. In his answer, the defendant denied all the substantial allegations of the complaint and denied that he had securities of the value of sixty thousand dollars, or of any sum or amount in excess of about two thousand dollars, admitting, however, the ownership of other community property, to which further reference will be made. In the cross-complaint the defendant set up a cause of action against the plaintiff for divorce on the ground of willful desertion, and a second cause of action based upon alleged cruelty of the plaintiff. Upon receiving notice of the application for alimony during the pendency of the suit, Quinn made an affidavit expressly referring to the statements set forth in his answer and cross-complaint in regard to the community property and closing with the statement: "In relation to said assertions about defendant's great wealth, defendant says that at the time of the great fire in San Francisco, he had the home above mentioned; that the other lot of the community was unimproved, and that he had less than three thousand dollars in cash. Since that time he has earned the money necessary to erect the said flats amounting to twenty thousand dollars and has paid for all of the street work in connection therewith, amounting to five thousand dollars, and to buy the Stevenson Street property for three thousand five hundred dollars, mak-

ing a total accumulation made by the defendant in that time of thirty-two thousand seven hundred dollars, which defendant submits is all that he could be expected to accumulate in that short space of time in consideration of his age and bodily condition." About the time the answer was filed and the affidavit served on plaintiff negotiations were opened for the settlement of the property interests of the parties to the divorce suit. It does not appear whether negotiations were pending when the answer was filed or whether they were opened shortly after. The negotiations were carried on between the attorneys of the respective parties and extended over a period of from one to two months. During the negotiations, some five or six offers of settlement of the property interests were made on behalf of Quinn, and they were successively rejected by Mrs. Quinn. On the trial of this case the rule excluding evidence of confidential communications between attorneys and clients was rigidly applied to the evidence of the attorneys of both parties. It appears, however, that no direct representation was made either by Quinn or by his attorney to Mrs. Quinn or anyone in interest with her in regard to the amount of community property, unless the representations made in the answer and cross-complaint and in the affidavit served upon Mrs. Quinn or her attorneys can be so construed. The only statement ascribed to the attorney for Quinn during the negotiations was, "Your client says one thing and my client says another." Whereupon, the attorneys for both parties continued to deal in view of the community property known by the attorneys for the plaintiff to exist. Despite the fact that Mrs. Quinn repeatedly told her attorneys that she believed Quinn had some sixty thousand dollars' worth of securities, Quinn's deposition was not taken, nor was any direct inquiry made of him, nor, so far as the record shows, of his attorneys in regard to the discrepancy between the belief of Mrs. Quinn and the statements of Quinn in his answer and cross-complaint. After rejecting many offers of settlement, the plaintiff entered into a stipulation which is attacked in the present suit. The property agreement embodied in the stipulation was made upon the assumption that under it each of the parties should receive one-half of the community property. The stipulation was for a division of all the community property. It provided that a certain lot was the property of Nellie Riley, a married

daughter of the parties; that plaintiff Delia Quinn, now Delia Milekovich, should receive a lot in San Francisco, 60 by 120 feet, improved by a building containing six flats, and another lot 25 by 95 feet, together with the family dwelling-house thereon and its contents, except personal belongings of the husband; that "all of the remainder of the community property of said community shall be awarded to and be the sole and separate property of the defendant, Patrick P. Quinn, including the following described real property"; after which followed a description of a lot 75 by 95 feet, another lot 27 feet 6 inches by 85 feet, a lot in San Leandro, in Alameda County, "and also all personal property of every kind and description of said community other than the contents of said Ninth Avenue dwelling-house."

It is further stipulated that "the foregoing division of the community property is in absolute, entire, and complete satisfaction and discharge of all claims which either party to said action might assert against the other whether on account of property rights, interest in community property, or rights to maintenance, alimony, costs, and counsel fees." In consideration of the "foregoing statements and compromise," the parties mutually released each other from all claims and demands and bound themselves to execute such conveyances as might be proper to effectuate the settlement. The stipulation closes as follows: "It is furthermore stipulated and agreed that in case the above-entitled court shall make and enter any decree in the above-entitled action awarding a divorce to the plaintiff or to the defendant in said action that the said court shall find that all of the property hereinbefore referred to is community property of plaintiff and defendant and shall divide the same between them in accordance with the terms of this stipulation."

The interlocutory decree, after adjudicating the divorce, adjudicated and decreed that the real property of the community belonged to and should vest in the respective parties, following the provisions of, but not referring to, the stipulation, and the decree contained the following statement: "It is further ordered, adjudged, and decreed that the foregoing division of the community property is an absolute, entire, and complete satisfaction and discharge of all claims which either party to said action might assert against the other whether on account of property rights, interest in com-

munity property or right to maintenance, alimony, costs and counsel fees." The deeds to the real property were executed in accordance with the terms of the stipulation and decree. Shortly after discovering the fraud practiced upon her by Quinn, plaintiff commenced the present action. The other parties alleged to have been custodians of a portion of the bonds or their proceeds were joined as parties to the suit. In the complaint the history of the divorce action is set forth at considerable length and it is alleged that in reliance upon the statements made in the answer and cross-complaint, and in the affidavit of Quinn, the property settlement was made; that the statements were untrue and the settlement would not have been made but for the statements. As stated before, the essential facts are admitted either directly in the pleadings of the defendants or by statements of the defendant Quinn on the witness-stand. In the complaint it is not in terms stated that the plaintiff desires to subject herself to any order which might be made in a court of equity, nor that she desires to do equity. There is no allegation, nor was there any evidence of rescission or attempted rescission. The plaintiff prayed judgment "canceling, annulling, and setting aside" the agreement in the divorce action, the deeds from the plaintiff to Quinn, from the plaintiff and Quinn to Mrs. Riley, from Quinn to the plaintiff, and the interlocutory decree "so far as it affects the property"; that it be further adjudged and decreed that certain real property is the separate property of the plaintiff and that all other property described in the complaint and "now standing in the name of the defendant, Patrick P. Quinn, as well as that standing in the name of defendant, Nellie E. Riley, is community property," and that Nellie E. Riley and Quinn be declared trustees of a trust in which the interest of the plaintiff should be determined; that the defendant should be required fully to account and the court decree the plaintiff to be the owner of one-half of the property in the possession or under the control of Quinn or Mrs. Riley; that the exact value of the property "wrongfully and fraudulently concealed" be determined as of the time of the settlement of the property rights in the divorce action and the plaintiff decreed to be entitled to one-half thereof, and for general relief.

The findings and decree were very lengthy and determined that the plaintiff is entitled to twenty-two thousand five hun-

dred dollars, the value of one-half of the bonds and securities, with legal interest from the date of the interlocutory decree; that the recitals in the decree that the remainder of the community property should be awarded to Quinn and that the division was in absolute, entire, and complete satisfaction were made by reason of a settlement made out of court and obtained by Quinn from the plaintiff through fraud, by which the plaintiff was prevented from presenting to the court and obtaining a judicial investigation of the true facts; that the stipulation be annulled; that the plaintiff in addition to the recovery of twenty-two thousand five hundred dollars be given a lien upon all of the personal and real property owned and possessed by the defendant Quinn; that Quinn and Fred J. Riley are involuntary trustees for the plaintiff of the real and personal property described in the decree as belonging to Quinn; that the plaintiff is the owner of the lot containing the six flats; that the plaintiff has no right in the property standing in the name of Mrs. Riley; that Quinn is the owner of the lots he took under the stipulation, charged with the trust for the payment of the twenty-two thousand five hundred dollars; that the defendant is the owner of a certain lot to which the plaintiff has no right. The decree further appointed a commissioner to take possession of and sell the property, subject to the trust.

The appellant maintains that many of the findings are not supported by the evidence and calls particular attention to the finding to the effect that by means of the false pretenses, representations, answer, affidavit, and wrong concealment with intent to cheat and defraud the plaintiff, Quinn prevented the plaintiff from obtaining a judicial investigation and trial of the issue of property, upon which argument is made that the fraud in the present case was intrinsic in nature and not such fraud as equity will relieve against. This argument is made more fully by the appellant in another connection and will be considered with the point upon which it is most fully developed by the counsel for the appellant. Objection is made to a finding against the defendant in the matter of his alleged meritorious defense to the divorce action, and it is argued either that no such finding should have been made or that there was no evidence to support the finding. A portion of the appellant's argument is based upon the question of whether or not relief in such a case as this can be

given without setting aside the entire divorce decree. The argument upon this point presented upon behalf of the appellant will be considered in connection with that contention. Objection is made to the finding that one of the parcels of land was the separate property of the plaintiff, and it is argued that in such a case as this, under the general rule that the parties must be replaced in the respective positions they occupied at the time of the fraudulent agreement, if for any reason they cannot be so restored, equity is powerless to relieve against an admitted fraud. This, also, is more fully argued under other points made on behalf of the appellant.

[1] Appellant maintains that since the property in issue in this action was community property, there was no issue upon which a finding could be made and no evidence to support a judgment quieting the plaintiff's title to the undivided one-half interest in the fee in any of the property. It is argued that since the community property is under the absolute control of the husband, and the wife during the existence of the community has only an inchoate right to any of the property, it is beyond the power of the court in this suit to determine her interest in the property of the community. The community no longer exists. If in a divorce case the parties agree to a division of the community property, it is unnecessary for the court to adjudicate upon their respective interests in the former community property. If no such agreement is made, it is the duty of the court in which the divorce proceeding is pending to determine the relative interests of the spouses in their common accumulation. In this case the parties did in form agree upon substantially an equal division of the community property between them. The wife claims in this suit that in entering into the former agreement, she was deluded and defrauded of her one-half interest in the forty-five thousand dollars worth of securities secreted by the husband. The lower court awarded to her this one-half interest and declared that the property of the former husband was burdened with a trust to pay her the amount of the award. If there was jurisdiction in the court to grant relief to the defrauded wife, under a well-established rule the court might make any decree within those principles of good conscience and fair dealing which are recognized as controlling the discretion of the chancellor.

[2] Under the rule of rescission, the appellant contends that since the plaintiff did not offer to return to the defendant the property received by her under the stipulation, she has failed to bring herself within the requirement that one who seeks relief at the hands of a court of equity must first do equity. It is further argued that since the attack is upon the divorce decree, the decree must be set aside in its entirety, if at all, and because the parties cannot be restored to their original positions, a court of equity can give the defrauded wife no relief. The fallacy of the first of these contentions is that in this suit, the wife was not seeking to have any new evaluation made of the property which had been divided, for the purpose of redivision, but was seeking only one-half of the property which had been secreted. Nothing would have been gained by undoing what had been done in regard to the property divided and the law does not require idle things to be done. The result would have been the same if she had herself deeded back the property she received, or if the court, upon the evidence submitted to it, had decreed that she owned the property she had formerly received and was entitled to twenty-two thousand five hundred dollars more. "It is not an invariable rule that rescission of a contract obtained by fraud will be denied merely upon the ground that the parties cannot be placed in *statu quo* . . . Parties engaged in a fraudulent attempt to obtain a neighbor's property are not the objects of the special solicitude of the court. . . . Restoration is not exacted on account of any feeling of partiality in regard to the fraudulent party. The law cares very little what his loss may be and exacts nothing for his sake." (*Green v. Duvergey*, 146 Cal. 379-389, 390, [80 Pac. 234, 238].)

In regard to the second contention under this point: "The judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in her behalf. The judgment is not conclusive in such a case. The question to be determined is whether the adjudication was not produced by fraud or mistake. It may be said that in such a case the legal validity of the judgment is admitted, and it is because of its validity, or apparent validity, that the plaintiff requires to be relieved from it." (*Eickhoff v. Eickhoff*, 107 Cal. 48, [48 Am. St. Rep. 110, 40 Pac. 25].) It is not necessary under the rule announced in

Green v. Duvergey, supra, that a divorce decree be set aside either in whole or in part. [3] The sole question is whether or not under the facts of the present case the court had power to grant relief to the defrauded wife. This question is the one raised by the general demurrer of the defendant, his motion at the opening of the trial to exclude all evidence in support of the allegations of the complaint and his attack upon the judgment here. All of his other contentions merge in the determination of this contention. In reliance upon *United States v. Throckmorton*, 98 U. S. 61, [25 L. Ed. 93, see, also, *Rose's U. S. Notes*]; *Pico v. Cohn*, 91 Cal. 129, [25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970, 27 Pac. 537], and a long line of decisions announcing the same principle, the appellant maintains that no relief can be granted the plaintiff in this action because the admitted fraud was intrinsic and should have been uncovered in the original suit. Lengthy quotations are made in the appellants' brief from these cases. There could be no question in regard to the application of the rule if the fraud in the present case were intrinsic. The appellant forcefully argues that because the plaintiff claims she was deceived by the statements in the answer and cross-complaint, filed in the divorce suit, and in the affidavit made by Quinn, the fraud was necessarily intrinsic, and says that "if a party may be allowed to litigate anew the matters in controversy on the ground that she relied on her adversary's pleading, then trials might be dispensed with altogether for their functions would have ceased." This position of appellant cannot be maintained. The statement of its corollary shows its fallacy as applied to the facts here. If the statements made by Quinn had not been made in his pleading or in his affidavit filed in the suit, but had been made to the plaintiff out of court, under the contention of the learned counsel for the appellant they might have furnished a reason for a court of equity relieving the plaintiff from the fraud practiced upon her. Can it be said that untrue statements by which the plaintiff was deceived lost anything of their effect by having been sworn to and filed in the pending divorce action? To answer this question in the affirmative would be to suggest a ready means for dishonest persons to accomplish fraudulent results. The rule is that false statements made upon the record will not warrant the setting aside of the judgment because the court was deceived

by them. Here there is no contention made that the court was deceived, but that the respondent was deceived, and induced thereby to enter into the fraudulent agreement. The false statements were made. The lower court found upon evidence to that effect that the plaintiff relied upon the statements and entered into a contract which was made out of court. The plaintiff claimed the aid of a court of equity, not because the false statements were sworn to, but because they were false. She does not seek relief from the judgment because it was based on perjured testimony, but because she was induced by false statements to enter into a contract out of court by which she was precluded from submitting to the court the very questions which but for the contract would have been submitted to judicial investigation. In the leading case in this state—*Pico v. Cohn*, 91 Cal. 129, [25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 970]—where a judgment was rendered upon perjured evidence induced by bribery, the court, in holding that equity would not relieve from such a fraud, in its opinion asked and answered the question of what is an extrinsic or collateral fraud within the meaning of the rule. "Among the instances given in the books, are such as these, keeping the unsuccessful party away from the court by a false promise of compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party and connives at his defeat, or being regularly employed, corruptly sells out his client's interest. In all such instances, the unsuccessful party is really prevented by the fraudulent contrivance of his adversary from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there." (*Pico v. Cohn*, 91 Cal. 139, [25 Am. St. Rep. 159, 13 L. R. A. 336, 25 Pac. 971].) In this case, by the fraudulent contrivance of Quinn, the lower court found the plaintiff was prevented from having a trial upon the issue raised by the pleadings in regard to the amount of the community property. It has too often been stated to require the citation of authority that equity will not attempt to put a fence around fraud nor to define just what form of deceit is fraudulent. The suggestion in *Pico v. Cohn* of certain things which had been determined to be collateral fraud was never intended to be and was not a recital of all of the devices in which dishonest men may engage to prevent the trial of issues of fact. [4] It is

argued that because the court found, pursuant to the fraudulent contract, that the division of community property in accordance with its terms was in absolute, entire, and complete satisfaction and discharge of all claims which either party might assert to the other, there was an adjudication beyond the reach of the court of equity because, as well stated by counsel for the appellant, a judgment entered into upon a stipulation of the parties is as sacred and unimpeachable as any other judgment. It is equally true that such a judgment is no more sacred than any other judgment. Counsel say: "If the property rights of the parties to the divorce action had been withdrawn entirely from the case a different question might have arisen. If the decree had been silent as to property, a different question might have arisen." They were withdrawn. The stipulation, as has been shown, expressly provided that they be incorporated in the judgment as agreed upon, and the judgment expressly incorporated them. There was no trial upon the property issues. The stipulation itself shows there was no judicial examination of the facts regarding the property issues. These matters were as effectually withdrawn from any judicial consideration as if they had been expressly withdrawn by the stipulation. If the statement of counsel be true that a different case would have been presented if the stipulation had declared what was the fact—that the court was not to adjudicate upon the property issues, but to enter a decree in accordance with the agreement of the parties—it follows that all that a dishonest party litigant need do to make his fraudulent contract effective is to go one step further in his scheme of fraud and stipulate that the court in its decree shall follow the language of the fraudulent stipulation. Such a conclusion would be intolerable. The case falls within that class where chancellors have repeated in every conceivable way that the effort on the part of the fraudulent actor more securely to bind his victim is itself one of the most convincing evidences of fraud.

As was said by the supreme court, speaking by Mr. Justice Crockett: "It would be a reproach to the administration of justice if such transactions were beyond the reach of a court of equity whose peculiar province is to strip off the flimsy disguises in which fraudulent actions are so often clothed, and to regard the substance, rather than the form." (*Perkins v. Center*, 35 Cal. 721.)

From the appellant's brief it appears that after this case was argued and submitted in the court below the court of appeal, first appellate district, decided the case of *Vragnizan v. Savings Union etc. Co.*, 31 Cal. App. 709, [161 Pac. 507], and that the respondent relies upon that case. It is sought to distinguish that case from the present one because the fraudulent stipulation in that case expressly withdrew from the consideration of the court the issues in regard to community property. But in this case the fraudulent stipulation just as effectually withdrew those issues from the consideration of the court, and expressly provided that the court should find and make its decree in accordance with the fraudulent recitals in the stipulation. There is no difference in principle between the two cases.

[5] The appellant argues that, under the rule by which equity denies relief in those cases where the adverse party has been guilty of negligence or lack of diligence, the plaintiff in this case was armed with the strongest weapon—that of cross-examination of the defendant—and because she failed to exercise it she should be denied relief in this suit. In the larger object of defrauding the plaintiff the very purpose and effect of the stipulation was to cause her to lay down this strong weapon of defense. By reason of the fraudulent stipulation the plaintiff was deprived alike of her privilege of cross-examination of defendant and of her right to have a judicial determination in regard to the amount of the community property. Because of the defendant's fraud, he was subjected to examination in the present case, and the court did investigate the question of the amount of community property and determined that the plaintiff was entitled to one-half of that which, in this case, the defendant admitted he had fraudulently secreted.

The judgment is affirmed.

Haven, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 2, 1919.

Shaw, J., Melvin, J., Lawlor, J., Wilbur, J., Lennon, J., and Olney J., concurred.

[Civ. No. 1929. Third Appellate District.—April 3, 1919.]

BLANCHE BARTON BRODERICK, Appellant, v. L. A. BRODERICK, Respondent.

- [1] **DIVORCE—ADULTERY—FINDINGS—EVIDENCE—APPEAL.**—Even though it be conceded that the trial court, in an action for divorce on the ground of adultery, should base its findings of guilt only upon evidence convincing to a moral certainty and beyond a reasonable doubt, it would still be the duty of the appellate court to give at least the same weight to the findings of the trial court as it does to the verdict of a jury in a criminal case.
- [2] **ID.—PROVINCE OF TRIAL JUDGE.**—The acts and conduct constituting adultery are of such a nature that an intelligent, observing, and experienced trial judge making full use of his opportunities to observe the conduct, temperament, manner, and appearance of the witnesses before him is in the nature of things more capable of reaching a just conclusion from the evidence than a court of review, even with the assistance of able and zealous counsel.
- [3] **ID.—FALSE CHARGE OF ADULTERY IN FORMER ACTION — CRUELTY—CONDONATION—SUBSEQUENT MISCONDUCT.**—In such action, a false charge of adultery made in a former action which is set up as a ground of cruelty is not to be considered as stale, although the parties had subsequent to such former action lived together as husband and wife, where there was subsequent misconduct which caused, and was calculated to cause, great mental suffering.
- [4] **ID.—CHARGE OF INFIDELITY — RELATIONS WITH OTHERS — ADMISSIBILITY OF LETTER.**—Where, in such action, the plaintiff alleged that the defendant had falsely accused her of infidelity and immorality, the court properly admitted in evidence letters written by the plaintiff to a person other than her husband which contained language that indicated that her relations with such person were of such a character as to leave her no cause for rightful complaint as to her husband's charge against her of infidelity.
- [5] **ID.—CONDUCT OF PLAINTIFF—TESTIMONY OF EYE-WITNESSES.**—In such action, testimony of other persons that on different occasions they had seen the plaintiff lying on the same bed with the person to whom such letter had been written was likewise relevant and pertinent, tending to contradict the allegations of her complaint.
- [6] **ID.—CHARGE OF FAILURE TO PROVIDE—REQUESTS FOR MONEY—ADMISSIBILITY OF LETTERS.**—Where, in such case, the plaintiff charged the defendant with willfully failing to provide, on cross-examination of the plaintiff the court properly permitted the introduction in evi-

dence of a letter written by her to the defendant containing a request for money and which, in substance and tenor, tended to show the actual relations between the parties as regards money matters.

- [7] **EVIDENCE—CROSS-EXAMINATION—TESTIMONY ADMISSIBLE.**—Rules of evidence are primarily rules of exclusion, and in this state the rule has never been so applied as to relieve a party when under cross-examination from his sworn obligation to tell the whole truth when it might in any degree tend to explain, qualify, or shed light on any relevant testimony given by him on direct examination.
- [8] **ID.—REPUTATION IN PLACE OF FORMER RESIDENCE—ADMISSIBILITY.** It is a question for the court to determine whether or not general reputation in a place of former residence is too remote in point of time to be allowed in evidence.
- [9] **ID.—REPUTATION.**—Where, in an action for divorce on the ground of adultery, it appears that the witnesses have never discussed the reputation of the plaintiff "except in the family," their testimony might properly be stricken out on motion, if such motion be made.

APPEAL from a judgment of the Superior Court of Kings County. M. L. Short, Judge. Affirmed.

The facts are stated in the opinion of the court.

H. A. Blanchard and H. Scott Jacobs for Appellant.

John G. Covert and John F. Pryor for Respondent.

BUCK, P. J., pro tem.—In September of 1915 appellant brought suit for separate maintenance of herself and minor daughter, alleging as the grounds of action failure to provide and extreme cruelty. In November of the same year she brought suit for divorce and custody of the minor children and all the community property upon the same ground. On motion of respondent these two causes of action were transferred from the county of Santa Clara to the county of Kings, and he answered in each action denying the allegations of cruelty and failure to provide. He also filed cross-complaints in each action, alleging extreme cruelty and adultery and praying for a judgment of divorce. These actions were by stipulation tried together on March 14, 1916; findings were made that it was not true that respondent was guilty of extreme cruelty or failure to provide; but the court did find

that appellant was guilty of extreme cruelty and of adultery. Pursuant to these findings, respondent was granted an interlocutory decree of divorce awarding him the custody of the minor son Lloyd and all of the community property except two thousand dollars. Appellant was awarded the custody of the minor daughter and the sum of two thousand dollars, to be paid in monthly sums of \$50 after entry of judgment until the entire award was paid. In the maintenance action the court denied appellant any relief. A motion for a new trial was made by appellant, which was denied, and appellant appealed from the order denying her motion for a new trial and also from the judgment and order entered in each of the actions. By stipulation the appeals in said actions will be heard and determined together upon the same transcript and briefs.

It is stated in appellant's brief that "the paramount issue on appeal is as to the sufficiency of the evidence to support the findings as to adultery." The evidence is fully set forth in the bill of exceptions and has been carefully read and considered by the court in the light of counsel's able and earnest brief. No useful or proper purpose can be served by reproducing this evidence in this record. If the trial court believed, as it had a right to, the testimony of the witnesses Meyers, Mr. and Mrs. Martin, Mrs. Davis, Hiram Barton, and the respondent, and distrusted, as it had a right to do, the testimony of the appellant and her co-respondent Gatlin, there was an ample basis of sufficient proof to establish the court's findings not only of adultery but also of extreme cruelty. While learned counsel vigorously attacks the veracity and character of some of respondent's witnesses, even to the extent of going outside of the record, he does not gainsay the potency of the damaging facts to which they testify. [1] And even though it be conceded that the trial court in an action charging adultery should base its findings of guilt only upon evidence convincing to a moral certainty and beyond a reasonable doubt, it would still be the duty of this court to give at least the same weight to the findings of the trial court as it does to the verdict of a jury in a criminal case. As stated by Justice Henshaw in the case of *People v. Durrant*, 116 Cal. 200, [48 Pac. 79]: "Upon a review of the evidence by this tribunal we may not examine with minute-

ness claims that witnesses are discredited or that their testimony is unworthy of belief or look to see whether some other conclusion might not have been warranted by the evidence." Also our supreme court in the case of *Robinson v. Robinson*, 159 Cal. 203, [113 Pac. 155], which like the case at bar was a suit for divorce: "We are bound by the well-established rule that the decision of the trial court upon issues of fact is conclusive upon us in so far as there is any substantial evidence tending fairly to support such decision, even though we may think that a different conclusion should have been arrived at. . . . The trial court was the exclusive judge of all questions of the credibility of witnesses and weight of testimony, and must be assumed to have considered all the evidence given in the light of such rules as are laid down by the law for the guidance of the court and jury in the determination of questions of fact. It should further be borne in mind that the question whether acts and conduct constitute such cruelty, as, under all the circumstances shown, warrants the granting of a divorce, is of such a nature that the conclusion of the trial court is necessarily entitled to great weight, and it is only where it is clear that it is without any substantial support in the evidence that it will be disturbed on appeal." [2] And to a much greater extent is it true that "the acts and conduct" constituting adultery are "of such a nature" that an intelligent, observing, and experienced trial judge making full use of his opportunities to observe the conduct, temperament, manner, and appearance of the witnesses before him is in the nature of things more capable of reaching a just conclusion from the evidence than a court of review even with the assistance of able and zealous counsel. (9 R. C. L., sec. 106; *Ellett v. Ellett*, 157 N. C. 161, [Ann. Cas. 1913B, 1215, 39 L. R. A. (N. S.) 1135, 72 S. E. 861]; *Thayer v. Thayer*, 101 Mass. 111, [100 Am. Dec. 110]; *Cooke v. Cooke*, 152 Ill. 286, [38 N. E. 1027].) And, therefore, as stated by Chief Justice Angellotti in the *Robinson* case above cited: "We feel that no useful purpose would be subserved by discussion of the evidence given upon matters embraced in the findings that are attacked by learned counsel in his brief as being without support."

The only contention counsel in his brief makes in regard to the finding of cruelty is that "the charges of cruelty are

not supported by any testimony whatever other than that of the husband and wife, which is insufficient (Civ. Code, sec. 130). Appellant makes proper explanations as to every charge of cruelty."

The acts constituting cruelty as charged in respondent's cross-complaint and found by the court are that on or about July 2, 1913, the appellant filed her complaint in the county of Glenn, falsely charging that respondent committed adultery with a woman in Los Angeles on April 23, 1913, and praying for a divorce and a division of the property; that she reiterated these false charges in letters to members of her family which were communicated to co-respondent; that in the spring of 1913 she permitted another man, over the objection of her husband, to occupy one of her rooms as a night lodger; that in July of 1914 she forbade respondent to call her "wife." And as additional acts of cruelty, causing him great mental anguish, respondent charges appellant with some of the same improper conduct with co-respondent Gatlin that he had alleged in his cause of action charging adultery.

As regards the suit commenced by appellant in Glenn County falsely charging respondent with adultery, respondent's testimony in regard to the commencement and dismissal of this action and the charges therein is corroborated by the records of the county of Glenn showing the complaint with signature of respondent's attorney with the seal and jurat of the notary public to appellant's verification of the complaint; also a telegram of appellant's attorney authorizing the dismissal of her action. No objection to this evidence was offered except that it "was barred by sections 124, 125, 126 of the Civil Code." There is also corroborating evidence that at the time of this action appellant was a resident of Kings County and went to Los Angeles not of his own motion or purpose but at the solicitation of his wife to come in pursuance of a telegram received by him from a stranger in Los Angeles by the name of Davis. This telegram was received in evidence without objection and corroborates the purpose and good faith of appellant's visit to Los Angeles. In the case at bar the record conclusively absolves the parties of any desire or purpose to obtain a divorce by collusion. The record conclusively shows that each party is attempting to obtain for himself or herself and prevent the other from obtaining a decree

upon the grounds of cruelty or adultery. A bitter conflict as to property interests and the custody of the children, as well as the evident feelings of the parties, leave the case absolutely devoid of any suspicion of collusion. Consequently, in this case at least, the reason of the rule requiring corroboration is much modified and a lesser degree and quantity of corroboration will be exacted. (*Blanchard v. Blanchard*, 10 Cal. App. 203, [101 Pac. 536]; *MacDonald v. MacDonald*, 155 Cal. 665, [25 L. R. A. (N. S.) 45, 102 Pac. 927].)

[3] Counsel contends that the complaint is stale as regards the alleged false charges of adultery in the Glenn County suit. A similar contention was made in the recent case of *Neeley v. Neeley*, 179 Cal. 232, [176 Pac. 163], but in that case our supreme court held as follows, in language which is quite applicable to the case at bar: "We should hesitate to say that an unexplained delay of three and a half years must, as a matter of law, be deemed unreasonable. But that is not the question here. The plaintiff's failure to proceed earlier is fully accounted for by the dismissal of the prior action, and the conduct of the parties thereafter. (Civ. Code, sec. 125.) The plaintiff condoned the offenses of 1911, but under the agreement, as well as by the terms of the law itself (Civ. Code, sec. 117), the condonation carried with it the condition subsequent that the plaintiff should be treated with conjugal kindness. This condition was broken by the defendant in 1915, and the original cause of action thereby revived. (Civ. Code, sec. 121.)" In the case at bar it is true that respondent lived with appellant as his wife up to August 5, 1915. But under the law this conditional condonation was revoked by the subsequent misconduct of the appellant with Gatlin, which caused, and was calculated to cause, respondent great mental suffering and of which he did not have knowledge until September 21 of 1915.

The appellant assigns as prejudicial error the overruling of her objection to the testimony pertaining to her relations with one John Hanford.

[4] This testimony was properly admitted because it was in direct response to and explanatory of issues raised by respondent herself in her complaint and in her own testimony. In her complaint filed in this action plaintiff charges that defendant "willfully inflicted upon her great and grievous

mental suffering and anguish . . . ,” and that some of said acts of cruelty are “. . . that on numerous occasions within the past ten years, the exact dates of which plaintiff is now unable to specify, the said defendant, without any cause or reason or provocation and wrongfully and falsely accused the plaintiff of infidelity and immorality.” Presumably to substantiate this charge in her direct testimony she states that “about the 27th of May, about ten years ago, he [respondent] accused me of adultery with John Hanford. . . . All of these charges that my husband made against me were not true. On June 20, 1915, at our home my husband admitted to me that they were not true. He said to me, ‘I know you to be the purest woman that ever lived.’” In view of the foregoing it is evident that it was not error for the court to admit in evidence appellant’s letter of August 31, 1904, to John Hanford, which contained language that indicated that her relations with Hanford were of such a character as to leave her no cause for rightful complaint as to respondent’s charges against her of infidelity. [5] Likewise the testimony of her uncle Hiram Barton and J. E. Gruwell that on different occasions in 1904 they had seen her lying on the same bed with John Hanford was relevant and pertinent testimony, tending to contradict the allegations of her complaint and the *prima facie* inferences to be drawn from her testimony that she had rightly suffered great mental and grievous anguish when respondent charged her, as she claims he did charge her, with adultery with John Hanford.

Learned counsel for appellant vigorously contends that the trial court erred in overruling appellant’s objection to the introduction in evidence as a part of appellant’s cross-examination of a letter written by her to the respondent in March of 1915, which contained, among other things, a request from appellant that he send her some money for hospital treatment in connection with a proposed abortion as well as money for other purposes.

The trial court evidently allowed this letter in evidence on cross-examination just as it allowed the above matters in regard to John Hanford, not for the purpose solely of proving respondent’s case, but as evidence tending to explain and qualify general testimony given by appellant herself in direct examination in support of charges made by her in her own

complaint against respondent. And in doing this we do not believe that the trial court erred or in any way abused the broad discretion with which the trial court is intrusted upon the cross-examination of a witness who is a party to the action. In her complaint in narrating one of the particulars in which defendant "had wrongfully and willfully inflicted upon her great and grievous mental suffering and anguish," she charges: "Defendant has willfully failed, neglected and refused to provide plaintiff with sufficient food, shelter or medical attention or sufficient means with which to furnish the same though able so to do; and had during the greater portion of said time compelled the plaintiff to live upon the charity of her friends and relatives and thereby causing and still causes plaintiff grievous humility and grievous mental suffering." For the purpose of substantiating these material charges appellant in her direct testimony testified as follows: "Since 1912 the defendant had not furnished anything for the children and I to live on. I have during that time supported myself and the children by my profession as an osteopathic physician. I have been practicing that since August, 1912. He has not paid our grocery bills, rent bills, and has not hardly paid any of the bills in general. I asked him repeatedly for money and he has refused it. . . . These acts of my husband which I have spoken of have humiliated me."

[6] Upon cross-examination she testified as follows: "In 1915 while in Los Angeles, I wrote home several times and asked for money. Q. Now, you say that you wrote to your husband and requested that he send you money when you were in Los Angeles in 1915; is that a fact? A. Yes, sir; I wrote him several times and asked for money. Q. In one of these letters didn't you write to him for money for the specific purpose of procuring an abortion? Mr. Biaggi: I object to that as not proper cross-examination. A. No, sir, I did not. . . . I wrote the letter which you are showing me, inclosed it in an envelope, placed a postage stamp thereon, addressed it to my husband and deposited it in a mail-box in the city of Los Angeles." The letter was then received in evidence, subject to the same objection, ruling, and exception, and, among other matters, stated: "Dear Ardy: Well, I am getting over the effects of my fall but I can never get over the

effects of my visit to the ranch. I am surely pregnant . . . so I am going to be operated on next week and you will have to send me some money . . . I am expecting a check from you to-morrow for those things at Bakersfield . . . now you must send me the money at once, I am sick about it. . . . I will have to have money enough to buy some gowns. I only have two and they are both rags, and to pay for operation and hospital fees . . . " Whatever else may have been the effect of this letter, in substance and tenor it surely tended to show the actual relations between the parties as regards money matters in 1915. It tended to show that at that time, at least, appellant was asking for money, not as one who was not accustomed to receive it, but was asking for it with the calm and firm assurance of the ordinary housewife, and to that extent the letter serves to explain, modify, and qualify her damaging and general testimony in direct examination that "since 1912 the defendant has not furnished anything for the children and I to live on. He has not hardly paid any of the bills in general. I asked him repeatedly for money and he has refused." Also, in connection with this letter respondent introduced in evidence a large number of checks which he had sent to appellant in 1915 and at other times.

[7] Learned counsel for appellant have cited and quoted liberally from numerous well-established authorities. But the strongest of these go only to the extent of holding that testimony on cross-examination, however discrediting, is inadmissible only when it is entirely foreign to the case and in no way germane to the matters brought out on direct examination and is offered for the sole purpose and with the sole effect of discrediting the witness or the party to the action. (See *Sharon v. Sharon*, 79 Cal. 632, at page 674, [22 Pac. 26, 131]; *Estate of James*, 124 Cal. 653, [57 Pac. 578, 1008], and cases cited; *Short v. Frink*, 151 Cal. 83, [90 Pac. 200]; *People v. Schmitz*, 7 Cal. App. 330, 357, 360, 364, [15 L. R. A. (N. S.) 717, 94 Pac. 407].) But rules of evidence are primarily rules of exclusion. And in this state from the beginning (*Jackson v. Feather River Water Co.*, 14 Cal. 19). the rule has never been so applied even in criminal cases as to relieve a party when under cross-examination from his sworn obligation to tell the whole truth when it might in any degree tend to explain, qualify, or shed light on any relevant testimony given by him on his own direct examination. As

stated by our supreme court in the case of *People v. Gallagher*, 100 Cal. 466, at page 475, [35 Pac. 80]: "Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, or to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination." The rule applied in the case at bar is illustrated in the case of *Davis v. Coblens*, 174 U. S. 719, at page 726, [43 L. Ed. 1147, 19 Sup. Ct. Rep. 832, see, also, Rose's U. S. Notes]: "Walter was called as a witness by plaintiff; testified that such reconveyance was the only one he had made of lot 10—the lot in controversy. Thereupon defendant's counsel cross-examined him at great length against the objection of plaintiffs, regarding his business of buying and selling real estate and the extent of it and character. The ruling of the court permitting the cross-examination is assigned as error. We see no error in it. The question of plaintiff's counsel was a general one, and opened many things to particular inquiry. The extent and manner of that inquiry was necessarily within the discretion of the court, even though it extended to matters not connected with the examination in chief. In *Rea v. Missouri*, 17 Wall. 532, [21 L. Ed. 707, see, also, Rose's U. S. Notes], it was said: 'Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error.' "

And the following cases from the federal jurisdiction further illustrate the extent to which the federal courts, in response to the demands of a progressive jurisprudence, are applying a rule conducive to the practical and effective administration of justice: *Commercial State Bank v. Moore*, 227 Fed. 19, [141 C. C. A. 573]; *Le More v. United States*, 253 Fed. 887, at page 896; *Diggs v. United States*, 242 U. S. 470, [L. R. A. 1917F, 502, 61 L. Ed. 442, 37 Sup. Ct. Rep. 192, see, also, Rose's U. S. Notes]. See, also, *State v. Carter*, 21

N. M. 166, [153 Pac. 270, at page 272]; *People v. Soeder*, 150 Cal. 12, [87 Pac. 1016]; *Graham v. Larimer*, 83 Cal. 173, at page 180, [23 Pac. 286]; *People v. Burke*, 18 Cal. App. 72, at page 78, [122 Pac. 535]; *People v. Davenport*, 13 Cal. App. 632, [110 Pac. 318]; *People v. Rozelle*, 78 Cal. 84, at page 91, [20 Pac. 36].

[8] Counsel also contends "that the court erred in permitting Mrs. Gruwell and Mrs. Rice to testify as to the general reputation of appellant in Kings County." It is true, as stated by counsel, that appellant "at the time of the trial and for more than three months prior to the commencement of the divorce action had been a resident of Santa Clara County." But the evidence also shows that prior to that and for many years she and her family had, for the greater part of her life, lived in the county of Kings. And, as stated in *People v. Cord*, 157 Cal. 562, [108 Pac. 511]: "It is a question for the court to determine whether or not general reputation in a place of former residence is too remote in point of time to be allowed in evidence." [9] However, when it seemed to appear upon cross-examination that the witnesses had never discussed her reputation "except in the family," it might have been proper for the court, upon motion being made, to have stricken out the testimony of the witness. But no such motion was made.

The order denying the motion for a new trial and the judgments in each action are affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 2, 1919, and the following opinion then rendered thereon:

THE COURT.—We do not regard as material to the decision the portion of the opinion reading as follows: "Consequently, in this case at least, the reason of the rule requiring corroboration is much modified and a lesser degree and quantity of corroboration will be exacted (*Blanchard v. Blanchard*, 10 Cal. App. 203, [101 Pac. 536]; *MacDonald v. MacDonald*, 155 Cal. 665, [25 L. R. A. (N. S.) 45, 102 Pac. 927]),—and express no opinion thereon.

The application for a hearing in this court, after decision in the district court of appeal of the third appellate district, is denied.

All the Justices concurred.

[Civ. No. 2721. First Appellate District, Division Two.—April 4, 1919.]

Q. SCRIBANTE, Respondent, v. WILLIAM EDWARDS et al., Appellants.

[1] **CONTRACTS—ADDITIONAL WORK ORDERED BY ARCHITECT—LIABILITY OF OWNER.**—Where the contract to lay a concrete floor in the basement of a building binds the contractor to do the work under the architect's direction, the owner of the building is liable to such contractor for extra work performed in the laying of a floor of additional thickness than that called for by the contract which is ordered by the architect after his attention is called by the contractor to the condition found to exist in the basement after the water is pumped out.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Affirmed.

The facts are stated in the opinion of the court.

Edgar C. Chapman for Appellants.

Albert Picard for Respondent.

BRITTAIN, J.—The defendant owner appeals from a judgment on a mechanic's lien. As stated in the opening brief, the single point presented is upon the interpretation of the contract. No authorities are cited in the briefs. The contract was evidenced by two writings, both prepared by the architect employed by the owner, one in form an offer to do the work, and the other a formal acceptance of the offer. The work was to lay a concrete floor in the basement of an old building, under which there was a pressure of water, causing it to percolate through the old floor and to flood the base-

ment. When the writings were prepared the basement was flooded to a depth of about eighteen inches and the old floor was covered with mud. It was impracticable, if not impossible, to ascertain the condition of the old floor, and the architect and contractor, at least, assumed it was substantially level. The offer was to pump out and to clean the basement and to do certain other work in addition to the main work of laying the concrete floor. Upon the assumption of substantial uniformity of the surface of the old floor, the contractor computed the amount of concrete which would be required to lay a floor with a foundation five inches thick with a surface of an additional thickness of one inch. The architect was not at that time sure whether a floor of the thickness bid upon would be sufficiently strong to stop out the percolating water; a unit price for extra thickness was fixed by a computation of the area of the basement multiplied by one inch to ascertain the number of cubic yards of concrete which would be required for each additional inch of thickness.

The clauses of the contract which are in question are the following: "Lay a concrete floor over the entire surface of the basement not less than five inches thick with good and proper fall to the sump at N. E. corner of the basement. . . . Lay a top or finish floor one inch thick, . . . This work is to be performed under the direction of Fred Burrage Wood, architect, for the sum of One Thousand and Twenty-five (1025.00) dollars, . . . Should you desire to increase the thickness of the base or foundation floor I will furnish the materials same as in proposed floor as above and perform the labor for the sum of One Hundred and Twenty-five (125.00) dollars per inch thickness over and above the proposed five inches."

When the basement was pumped out, upon the advice of the architect, the owner, through the architect, orally instructed the contractor to increase the thickness of the foundation one inch. It was then apparent that the old floor was undulating and that a floor of uniform thickness would not permit drainage to the sump. The contractor informed the architect that even with the proposed additional inch of concrete, if the floor were laid so as to permit drainage, it would leave only about three inches of thickness over the high places in the old floor. The architect thereupon directed the foundation to be made six inches thick over the high places and himself marked

at more than sixty places on the walls and pillars the elevations to which the floor was to be laid. When the work was completed it was found the additional concrete over the original amount determined by computation was equivalent to four and one-half inches over the entire floor, that is, the admittedly ordered inch plus three and one-half inches additional which it is admitted went into the basement in filling the low spots in the original floor and in bringing the floor to the grade directed by the architect, acting for the owner.

On behalf of the appellant it is contended that under the contract as modified by the order of the additional inch of concrete the contractor was bound to lay a floor not less than seven inches thick at the thinnest place, i. e., over the high places, on the old floor, and to lay that floor so that it would carry off the water, and, further, that when the contractor discovered the condition of the floor after it had been pumped out, if the two requirements could not be fulfilled, the contractor should have refused to proceed with the work.

[1] The contract bound the contractor to do the work under the architect's direction. The appellant by his argument admits the architect was the agent of the owner in ordering the contractor to lay the additional inch of foundation. To interpret the contract as contended for by the appellant would be to charge the contractor with the duty of determining at his peril which of the directions of the architect he was to fulfill and which he should disregard. Where the principal authorizes the agent to order work done, without notification to the contractor limiting the extent of the agent's power, the principal is bound, even though the agent exceeding his authority orders more work than the principal directed, in the absence of bad faith on the part of the contractor. (Civ. Code, secs. 2317, 2319, 2331, 2334.) When the attention of the architect was called to the physical impossibility of meeting the two conditions relied upon by the appellant, the architect directed the contractor to lay seven inches of concrete on the high places and to work to grades which the architect then established. The work ordered by the architect was done satisfactorily. The work and the labor performed and the materials furnished were used in the alteration and repair of the appellant's building. Having received the benefit of the work, the owner should pay for it. (Civ. Code, sec. 3521.) The knowledge of the architect that the work was being done

under his direction was notice to the owner. (Civ. Code, sec. 2332.) When the contractor told the architect what his order would require, the work might have been forbidden. (Civ. Code, sec. 3519.) There is no question presented as to the correctness of the amount for which judgment was rendered, if the interpretation of the contract by the lower court was correct. In holding the owner bound to pay for the extra work, the lower court interpreted the contract as binding the owner by the architect's order. This interpretation was correct.

The judgment is affirmed.

Langdon, P. J., and Haven, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 2, 1919.

All the Justices concurred.

[Civ. No. 2776. First Appellate District, Division Two.—April 4, 1919.]

ANNA CUNEO, Appellant, v. JOHN CUNEO, Respondent.

[1] **APPEAL—ACTION FOR DIVORCE—MINUTE ENTRY OF DECISION—WANT OF FINDINGS—SUBSEQUENT ORDER NOT APPEALABLE.**—In an action for divorce, an order entered in the minutes of the court, after issue joined and trial, denying to both parties the relief prayed for, does not constitute a final judgment where findings have not previously been made and filed with the clerk, or been waived, and an order thereafter made denying plaintiff's motion for an order directing the clerk to issue an execution against the defendant for unpaid alimony is not appealable under section 963 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of San Mateo County. Geo. H. Buck, Judge. Appeal dismissed.

The facts are stated in the opinion of the court.

Leon E. Prescott for Appellant.

Jos. H. Bullock and Phil. J. Strubel for Respondent.

HAVEN, J.—In this action for divorce an order was made shortly after the filing of the complaint requiring the defendant to pay to plaintiff's attorneys a certain sum on account of counsel fees, and further providing that defendant "pay forthwith to plaintiff personally, the sum of Fifty (\$50.00) Dollars per month for the support and maintenance of the plaintiff pending this action, and the same sum every month thereafter pending this action, until the further order of this court." The action was subsequently brought to trial upon plaintiff's complaint, the allegations of which were denied by defendant's answer, and upon the cross-complaint of defendant; each party to the action seeking a decree of divorce against the other. On November 23, 1917, the following order was entered in the minutes of the court: "This cause having been heretofore submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein, it renders the following decision: 'Plaintiff's prayer for a divorce is denied. Defendant's prayer for a divorce is denied.'" On February 28, 1918, plaintiff made a motion for an order directing the clerk of the lower court to issue an execution in said action in favor of plaintiff and against the defendant for the sum of \$150, claimed to be due her as alimony for three months, commencing December 16, 1917, and ending March 15, 1918. On March 18, 1918, the court made an order denying the said motion of plaintiff, from which latter order plaintiff attempts to prosecute this appeal.

[1] The entry on the minutes of the court on November 23, 1917, is not a final judgment in the action. Issues were tendered by the pleadings, and there is no showing that findings were waived. Consequently there could have been no rendition of judgment until such findings were made and filed with the clerk. (*Crim v. Kessing*, 89 Cal. 478, 488, [23 Am. St. Rep. 491, 26 Pac. 1074].) The record does not disclose that this has been done. The order from which this appeal is attempted to be taken, is, therefore, not an order made after final judgment and is not an appealable order under section 963 of the Code of Civil Procedure.

The appeal is dismissed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2652. First Appellate District, Division One.—April 4, 1919.]

GIUSEPPE DAMIANO, Appellant, v. FLEDA O. BUNTING, as Executrix, etc., et al., Respondents.

- [1] CORPORATION LAW—LIABILITY OF STOCKHOLDER FOR TORT OF CORPORATION—SURVIVAL OF RIGHT OF ACTION.—A cause of action exists against the stockholder of a corporation upon a corporate liability arising out of a tort, and such cause of action survives the death of the stockholder.
- [2] ID.—STATUTE OF LIMITATIONS—DEATH OF STOCKHOLDER.—An action against a stockholder, or his personal representative, upon a corporate liability arising out of a tort must be brought within the three-year limitation prescribed by section 359 of the Code of Civil Procedure. Where the stockholder dies within such three-year period, the time within which such action might be brought is not, by reason of the provisions of section 353 of the Code of Civil Procedure, extended to within one year after the issuing of letters testamentary or of administration.
- [3] ID.—JUDGMENT AGAINST CORPORATION—WHEN TIME BEGINS TO RUN. The time within which such action based on the stockholder's liability might be brought dates from the time of the plaintiff's injuries and not from the time he recovers judgment against the corporation for such injuries.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Donahue, Judge. Affirmed.

The facts are stated in the opinion of the court.

James A. Bacigalupi and Edmund Nelson for Appellant.

Thomas C. Huxley for Respondents.

RICHARDS, J.—This is an appeal from a judgment in defendants' favor after the order sustaining their demurrer to the plaintiff's complaint without leave to amend. The following are the facts of the case as shown by said complaint:

On May 13, 1913, one John A. Bunting was the owner of one hundred and eighty thousand shares of a total issue of two hundred thousand shares of a mining corporation known as the Birchfield Mining Company. On said May 13, 1913, the plaintiff was an employee of said corporation, and was

injured in an accident occurring in the course of his employment. John A. Bunting died on May 1, 1916. Thereafter and on May 17, 1916, the defendants were appointed the executors of his estate. Notice to creditors was duly ordered and published May 27, 1916. On February 27, 1917, the plaintiff herein presented his claim against said estate for the sum of \$10,900.32, alleged to be due upon the proportionate statutory liability of said John A. Bunting, deceased, as a stockholder in said corporation. The claim being rejected, the plaintiff commenced this action on March 31, 1917.

To his complaint setting forth the foregoing facts the defendants demurred upon the general ground, and also upon the grounds that the cause of action was barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure, and also by the provisions of section 359 of the same code. The court sustained the defendants' said demurrer generally and without leave to amend. The judgment followed, from which the plaintiff prosecutes this appeal.

[1] Three questions are presented upon this appeal, the first being as to whether a cause of action exists against the stockholder of a corporation under the laws of this state upon a corporate liability arising out of a tort. This question has, we think, been settled in favor of the existence of such liability on the part of a stockholder for the torts of the corporation by the case of *Miller & Lux v. Kern County Land Co.*, 134 Cal. 586, [66 Pac. 856], and by the case of *Lininger v. Botsford*, 32 Cal. App. 386, [163 Pac. 63], upholding such liability.

The second question which arises herein is as to whether the cause of action upon such stockholder's liability survives the death of the stockholder. This question was also determined in favor of the survival of such cause of action in the case of *Lininger v. Botsford*, *supra*, and to the reasoning and conclusions of that case we adhere.

[2] The third and final question arising herein is as to whether this action is barred by the provisions of section 359 of the Code of Civil Procedure relied upon in the defendants' demurrer and which reads as follows: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party

of the facts upon which the penalty or forfeiture attached, or the liability was created.”

The foregoing section of the Code of Civil Procedure is one of the sections embraced in chapter IV of title II thereof, which relates to the time of commencing civil actions. Section 353 of the same chapter and title contains this provision: “If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.”

It is the contention of the appellant herein that the provision of the code last above quoted takes his case out of the operation of the first above quoted section of the code, and gives him an extension of the period within which he otherwise must have commenced his action, arising out of the fact of the death of John C. Bunting a few days before the three years' period of limitation would have expired. This contention, however, is answered by the case of *King v. Armstrong*, 9 Cal. App. 368, [99 Pac. 527], in which Mr. Justice Shaw, of the second appellate district, quite clearly points out that section 359 of the Code of Civil Procedure is so explicit in its terms expressive of the inapplicability of any of the other provisions of the title of that code of which it is a part to actions against stockholders of corporations to enforce the liability created by law as to leave no room for any other construction. The conclusion arrived at in this case is fully enforced by the reasoning of the supreme court in the case of *Hunt v. Ward*, 99 Cal. 612, [37 Am. St. Rep. 87, 34 Pac. 335], wherein the court, with direct reference to the application of section 359 of the Code of Civil Procedure to the liability of stockholders of corporations in this state, says: “It must be remembered that the right to pursue the stockholder at all does not exist at common law, but is solely the creature of the written law; and that it must be exercised upon the conditions and within the limits which the written law prescribes. The invocation by respondent of the clause of the state constitution, declaring the liability of stockholders of corporations, does not strengthen his position; for the statement of a right in a constitution is always subject to reasonable statutory limitations of the time within which it may be enforced, unless

otherwise declared in the constitution itself; and three years is certainly not an unreasonable limitation. We see, therefore, no reason for disregarding the plain language of section 359. We need not inquire into the policy of the section; but as certificates of stock of many corporations pass frequently from hand to hand, it may well be assumed that the legislature intended to protect temporary stockholders from the power of officers of corporations and their creditors, to indefinitely extend the enforcement of liabilities created while they happened to be holders of stock. If the policy be unwise or bad, it is for the legislature to change it." (See, also, *Bank of San Luis Obispo v. Pacific Coast Steamship Co.*, 103 Cal. 594, [37 Pac. 499].)

[3] In the reply brief of appellant it is attempted to be argued that regardless of the liability of said stockholder arising at the time of the plaintiff's injuries he is entitled to rely upon a liability which was created by the alleged fact that appellant had in an action commenced by him against the corporation recovered a judgment for damages for his said injuries within the period of three years prior to the commencement of the instant action. It suffices to say that the cases of *Hunt v. Ward* and *Bank of San Luis Obispo v. Pacific Coast Steamship Co.*, *supra*, furnish a complete answer to this contention.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 2, 1919.

Angellotti, C. J., Shaw, J., Melvin, J., Lawlor, J., Wilbur, J., and Lennon, J., concurred.

[Civ. No. 2753. Second Appellate District, Division One.—April 4, 1919.]

WILLIAM G. MCADOO, Director-General of Railroads,
Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.

- [1] **WORKMEN'S COMPENSATION ACT—OMISSION TO USE GOGGLES—DISOBEDIENCE OF RULES AND INSTRUCTIONS — WILLFUL MISCONDUCT — REDUCTION OF COMPENSATION.**—Where a machinist's helper engaged by a railroad company voluntarily and intentionally omits to obtain and use goggles, contrary to rules of which he has knowledge, and contrary to specific instructions, all of which were laid down for his protection, because goggles are "in his way," he preferring to take the chance of personal injury, he is guilty of willful misconduct, and under section 6, subdivision 4, of the Workmen's Compensation Act of 1917, the compensation otherwise recoverable by him should be reduced one-half.

PROCEEDING in *Certiorari* to review an award of the Industrial Accident Commission. Award annulled.

The facts are stated in the opinion of the court.

Dana T. Smith and E. E. Bennett for Petitioner.

Christopher M. Bradley and Warren H. Pillsbury for Respondents.

CONREY, P. J.—*Certiorari*. Pursuant to stipulation, the above-named petitioner has been substituted in place of the original petitioner, Los Angeles & Salt Lake Railroad Company. The writ was issued to review an order of the Industrial Accident Commission, awarding to Robert H. Hogan compensation for injuries received by him while working as an employee of said Railroad Company. It is conceded that if the injury received by Hogan was caused by his serious and willful misconduct, this court may set aside the award and remand the case to the commission for the reduction of the award to one-half of the amount allowed by the commission.

Section 6 of the "Workmen's Compensation, Insurance and Safety Act of 1917" (Stats. 1917, p. 831), in subdivision 4 thereof, reads as follows: "Where the injury is caused by the

serious and willful misconduct of the injured employee, the compensation otherwise recoverable by him shall be reduced one-half; *provided, however*, that such misconduct of the employee shall not be a defense to the claim of the dependents of said employee, if the injury results in death, or to the claim of the employee, if the injury results in a permanent partial disability equaling or in excess of seventy per cent of total; *and provided, further*, that such misconduct of said employee shall not be a defense where his injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the commission, with reference to the safety of places of employment." The award in this case is made upon a permanent partial disability equaling thirty and one-quarter per cent of total disability of the right eye.

The accident by which the applicant R. H. Hogan was injured occurred on February 12, 1918, while he was employed as a machinist's helper. He was reaming saddle-bolt holes in a locomotive with an air motor and reamer. The reamer became stuck and caused a burr to form in the top of the hole. He removed the reamer and chipped the burr off, and a piece of steel glanced off and struck him in the eye. He was not at that time wearing any goggles or other protection to the eyes. He had been employed as a machinist's helper at that place for about four months, and had several years' experience as a workman in other machine-shops. At several places in the shop was posted a circular headed "Safety Rules for Shopmen." One of these was, "Do not do any chipping or grinding without wearing safety goggles. If you are not provided with goggles, go to foreman." The applicant admitted that he had seen the notices posted, but that he never read them. Nevertheless, it is conceded that he was "familiar with the purport" of this rule. He knew that the company provided goggles and that they were to be found in the tool-room. The following questions and answers are part of the testimony of the applicant before the commission: "Q. Have you ever used any glasses at all? A. I used goggles when I was doing a regular job of chipping. Q. You were doing a job of chipping at that time? A. Regular chipping job. This is just an incident of where you pick up a hammer and chisel and knock off a chip and go right ahead with your regular line of work. Q. You were using a reamer driven by air

under pressure? A. Yes. Q. And the reamer stuck in the hole? A. Yes. Q. That raised around the edge of the hole some chips of steel? A. Rough place. Just caused a rough place at the top of the hole. That prevented the reamer from running smoothly. In order to get a smooth surface to start from I knocked those chips off and for that purpose I picked up a hammer and chisel. It was while using a hammer and chisel that the piece of steel flew into my eye. . . . Q. Had you been given any orders at all as to wearing the glasses when you were engaged in such work as that? A. No, sir."

On cross-examination the applicant admitted that he had on another occasion some cast-iron burrs in his eyes and had the clerk of the general foreman remove them. He said that he did not remember that about an hour before the time when he received his injury for which he seeks to obtain compensation, he got another piece of metal in his eye and also had it removed by the clerk. Also he did not remember that the first of these two incidents occurred on the day preceding the accident in question here, and that the clerk and the general foreman both told him to get goggles and wear them when he was doing work where particles of metal were liable to fly. He testified that he knew that goggles were kept in the tool-room to be used by workmen, "if they thought they needed them." After the foreman, Keith, and his clerk, Pauff, had testified fully to both of the incidents referred to in the above-mentioned cross-examination, Hogan gave further testimony. In this later testimony the following occurs: "Q. You have heard the testimony of Mr. Keith and Mr. Pauff as to your having been in the office the day previous with some foreign body in your eye, have you? A. Yes. Q. Is that testimony correct or incorrect? A. I went in there before this, I don't remember whether that was the exact date or not. Q. Do you know how you got the foreign body in your eyes that was in there at that time? A. Drilling holes in cast iron, and the dust in the air from the exhaust of the motor. Q. You told them that was the way you got it in, did you? A. Yes. Q. And you supposed that was the way? A. I told them I was drilling holes in the saddle— Q. The morning you received the injury that caused the loss of your eye had you made a previous visit to Mr. Pauff? A. I had been there before with this dust in my eyes, but I don't remember whether that was the morning

before or not. Q. How many times were you there? A. There just on this occasion with this cast iron, I remember twice, and he gave me some water, some eye-wash to wash it out. Q. Do you recall whether you were there that morning or not? A. I don't remember whether that was the time that I was or not."

[1] It thus appears that there is no definite contradiction of the testimony given by the foreman and clerk on this matter, but rather that silence which gives consent. The job on which Hogan was employed involved the reaming of about fifty of those saddle-bolt holes, and included more than one day's work. That the forming of burrs was a common incident of that work is not denied. It was so much expected that Hogan kept by him a hammer and chisel with which to remove the burrs. He voluntarily and intentionally omitted to obtain and use goggles, contrary to rules of which he had knowledge, and contrary to specific instructions, all of which were laid down for his protection. The only reasonable explanation is that he disliked the goggles because they were, as he said, "in his way"; and so he preferred to take the chance of personal injury. This was willful misconduct and it was serious. The case was in essential elements very similar to that disclosed in *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, [149 Pac. 35], where an electric lineman disobeyed a known rule and positive instructions requiring him to wear rubber gloves while handling high-power wires, and in consequence was killed while doing that kind of work without gloves. As the court there said: "It cannot be doubted that a workman who violates a reasonable rule made for his own protection from serious bodily injury or death is guilty of misconduct and that where the workman deliberately violates the rule, with knowledge of its existence and of the dangers accompanying its violation, he is guilty of willful misconduct." The case at bar sharply distinguishes itself from that of *Diestelhorst v. Industrial Acc. Com.*, 32 Cal. App. 771, [164 Pac. 44], where the misconduct of the applicant occurred in a moment of thoughtlessness and not with deliberate intention. The commission's finding, that the applicant's injury was not proximately caused by his serious and willful misconduct, is not sustained by the evidence.

Our conclusion is, that upon the record produced herein, the award to the applicant should have been for only one-half

of the amount allowed by the commission, and as to the excess above that amount the commission acted in excess of its powers. The award is annulled, and the case is remanded to the Industrial Accident Commission for further proceedings in accordance with this decision.

Shaw, J., and James, J., concurred.

[Civ. No. 2400. Second Appellate District, Division One.—April 4, 1919.]

C. F. MORSE et al., Partners, etc., Appellants, v. IMPERIAL GRAIN AND WAREHOUSE COMPANY (a Corporation), Respondent.

- [1] **WAREHOUSES—LIABILITY OF WAREHOUSEMAN—RIGHT TO LIMIT BY PROVISION IN RECEIPT.**—In view of the provisions of section 3 of the "Warehouse Receipts Act" (Deering's Gen. Laws 1915, p. 2022), a warehouseman, by the insertion of a provision in his warehouse receipt that goods are deposited "for account and at the risk of" the depositor, cannot relieve himself from the liability imposed by section 21 of the act, which provides that a warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise.
- [2] **ID.—INCREASED LIABILITY BY CONTRACT.**—While a warehouseman cannot exempt himself from the liability thus imposed by law, he may by special contract assume liability for loss of goods due to any cause, thus making himself an insurer thereof.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. R. McNamee, Leo A. McNamee, Luke J. McNamee and Parke Godwin for Appellants.

Albert M. Norton and Emery & Rehart for Respondent.

SHAW, J.—Action to recover for 12 sacks of wool deposited with defendant as a warehouseman and which defendant failed to redeliver on demand therefor.

Judgment went for defendant, from which and an order denying a motion for a new trial made by plaintiffs, they appeal.

The case was submitted for decision upon an agreed statement of facts, the material parts of which are as follows: "The respective parties hereto . . . agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The facts agreed upon are as follows: 1. The defendant is . . . a public warehouseman. 2. The plaintiffs . . . did, on April 15, 1916, duly deliver to defendant as such warehouseman, 69 sacks of wool for storage, which defendant agreed to receive, keep and store in its warehouse in the city of El Centro . . . in accordance with the following warehouse receipt," which receipt, in addition to the matters required to be specified therein by section 2 of "An act to make uniform the law of warehouse receipts," stated the wool was received "*for account and at the risk of Morse & Brackenberry*"; and also contained a provision that: "The Imperial Grain and Warehouse Company is not responsible for loss occasioned to the merchandise stored with them, by fire or elements." "4. On July 5, 1916, plaintiffs duly demanded a redelivery of said 69 sacks of wool, and then and there offered to pay defendant the full amount of its storage charges thereon. 5. Upon such demand defendant redelivered 57 sacks thereof, but failed and refused to redeliver the remaining 12 sacks thereof, giving as a reason therefor that the 12 sacks, on some date unknown, had disappeared, or were stolen from its said warehouse, without any fault or carelessness, misconduct, or negligence of defendant, or its servants or either of them, and through no lack of ordinary care or diligence on the part of the defendant or its servants and while defendant was using ordinary care and diligence, which plaintiffs contend is no defense to this action, even if true." By the stipulation, "the points in controversy" as specified for submission to the court for its determination were: "1. Is not the liability of the defendant absolutely fixed by the provisions of its warehouse receipt above set out?" 2. Under the rule of "*expressio unius est exclusio alterius*," does not the provision exempting defendant from loss due to fire or the elements estop it from making any defense other than that the goods were so lost? 3. Is defendant's liability restricted to such

loss only as resulted from the want of ordinary care and diligence? It was further provided that if the court upon the "above statement" should find for plaintiffs, judgment should follow in their favor; otherwise it should be for defendant.

An act of March 19, 1909, entitled "An act to make uniform the law of warehouse receipts" (Deering's Gen. Laws 1915, p. 2022), requires all receipts to embody certain provisions, and section 3 of said act provides that a warehouseman may insert in a receipt any other terms and conditions, provided that such terms and conditions shall not "in any wise impair his obligation to exercise that degree of care in the safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own." And section 21 of said act provides that a warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he *shall not be liable, in the absence of an agreement to the contrary*, for any loss or injury to goods which could not have been avoided by the exercise of such care.

[1] Counsel for both parties, as they must, concede the receipt should be interpreted in the light of the provisions of the act from which we have quoted. This being true, provisions having for their purpose the exemption of a warehouseman from liability which the law in express terms imposes upon him, cannot be deemed effectual for any purpose. Hence it follows that defendant could not by the provision, "for account and at the risk of Morse & Brackenberry," so inserted in the receipt, relieve itself from liability for loss of the goods if such loss resulted from a want of ordinary care and diligence exercised by it. [2] To this extent the law protects one who for hire deposits his goods for storage with a warehouseman who, while he cannot in any case exempt himself from the liability imposed by law, may by special contract assume liability for loss of goods due to any cause, thus making him an insurer thereof. However, there is nothing whatever in the receipt before us upon which such additional liability can be predicated.

In support of their argument for reversal, appellants cite a number of cases to the effect that, since the provision, "for account and at the risk of Morse & Brackenberry," is to be

disregarded, and since the loss of the goods was not due to fire or the elements, the contract should be construed as an absolute promise on the part of defendant to redeliver the goods, as was held in the case of *Pope v. Farmers' Union Milling Co.*, 130 Cal. 139, [80 Am. St. Rep. 87, 53 L. R. A. 673, 62 Pac. 384]. In that case a number of sacks of wheat were received by a warehouseman upon an agreement to redeliver the same, subject alone to loss due to the elements. It was held that a failure to deliver the goods for any cause other than that they were destroyed by the elements constituted no defense. That case and others to like effect were decided prior to the adoption of the act of 1909 and at a time when the extent of a warehouseman's liability was the unrestricted subject of special contract.

The question as to whether defendant was guilty of negligence in the care of the wool must be determined from the facts agreed upon, which the trial court construed as a stipulation that the theft or loss of the goods was not due to negligence or want of ordinary care on the part of defendant, and that as custodian thereof it had exercised ordinary care. Construed in the light of the surrounding circumstances, and having in view the purpose which prompted it and the points submitted for determination, there can be no doubt that it was intended as an admission by plaintiffs that the loss of the goods, as alleged in the answer, was not due to carelessness or negligence of defendant, and that as custodian thereof it had exercised ordinary care. Otherwise construed, there could be no purpose in inserting defendant's reasons for failure to redeliver the 12 sacks of wool, which, as stated, "*plaintiffs contend is no defense to this action, if true.*" That such was the intent appears from appellants' brief, wherein counsel, in referring to the language quoted, says: "In framing such clause plaintiffs had in view the decision of this court in *Pope v. Farmers' Union Milling Co.*, 130 Cal. 139, [80 Am. St. Rep. 87, 53 L. R. A. 673, 62 Pac. 384]." Clearly, the case was submitted to and decided by the trial court upon the theory that the fact as to whether defendant was negligent in the care of the wool was immaterial; that conceding it had exercised ordinary care, nevertheless, since the goods were not destroyed by fire or the elements, it was, as decided in *Pope v. Farmers' Union Milling Co.*, *supra*, bound upon demand

therefor to make delivery thereof. The effect of the stipulation, taken in connection with plaintiffs' action thereunder, was to concede that defendant was not chargeable with negligence or want of ordinary care, which, upon their theory, constituted no defense to the action.

Since no appeal lies from the order denying the motion for a new trial, it is dismissed. The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 2653. First Appellate District, Division One.—April 5, 1919.]

IDA INGRAHAM, Respondent, v. GEORGE A. INGRAHAM, Appellant.

- [1] **DIVORCE—DESERTION—REFUSAL TO HAVE REASONABLE INTERCOURSE—INSUFFICIENT CORROBORATION.**—In an action for divorce on the ground of willful desertion based upon persistent refusal to have reasonable matrimonial intercourse as husband and wife, where the corroboration of the plaintiff's testimony was merely the testimony of other witnesses that the parties, though living in the same house, occupied separate bedrooms, it was not of the character and degree required by the code section relating to corroboration in divorce cases.
- [2] **ID.—EVIDENCE—DIFFICULTY TO CORROBORATE—EFFECT.**—While the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties themselves, nevertheless the parties to such divorce action are not thereby relieved from the necessity of complying with the mandate of the law respecting corroboration.
- [3] **ID.—PHYSICAL CONDITION OF DEFENDANT—BURDEN OF PROOF.**—In this action for divorce on the ground of willful desertion based upon persistent refusal to have reasonable matrimonial intercourse as husband and wife, there was no testimony nor were any facts elicited, tending to show that the health or physical condition of the defendant did not make his refusal to have reasonable matrimonial intercourse reasonably necessary. The burden of establishing this fact rested on plaintiff.
- [4] **ID.—PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint for divorce on the ground of willful desertion which contains the usual

general allegation that "defendant willfully and without cause, or provocation, deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live separate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff," in the absence of a demurrer for a definite statement of the facts, is not subject to the objection for the first time on appeal that it does not inform defendant that the desertion was intended to be established under the first provision of section 96 of the Civil Code.

APPEAL from an interlocutory decree of divorce granted by the Superior Court of Alameda County. Stanley A. Smith, Judge Presiding. Reversed.

The facts are stated in the opinion of the court.

M. L. Rawson and Geo. Ingraham for Appellant.

John W. Stetson and A. T. Shine for Respondent.

WASTE, P. J.—Plaintiff was granted an interlocutory decree of divorce, on the ground of willful desertion, and defendant appeals. The original complaint alleged that "defendant willfully and without cause, or provocation, deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live separate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff." An amended and supplementary complaint was filed, setting forth the ground of desertion in the same form, and adding a second count, based on allegations of extreme cruelty. Defendant answered, denying the allegations of the complaint, and at the same time filed his cross-complaint, alleging willful desertion and extreme cruelty on the part of plaintiff.

The trial court found for the plaintiff on the ground of willful desertion alone, and decree followed. The finding as to willful desertion is couched in almost the identical language of the allegation hereinbefore quoted. Appellant attacks this finding upon the ground that the testimony introduced in the action and on which the finding is based is not sufficient to support the judgment or decree in that regard.

"Willful desertion is the voluntary separation of one of the married parties from the other with intent to desert." (Civ. Code, sec. 95.) Sections 96, 97, and 98 of the same code set forth the different classes of facts which may manifest such desertion. (*Devoe v. Devoe*, 51 Cal. 543.) Section 96 is as follows: "Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion."

[1] The proof adduced at the trial of this action established the fact that the plaintiff and defendant, for several years, and up to the time of the commencement of the action continued to live in the same house, but occupying separate rooms. The desertion complained of by the plaintiff consisted of the gradual, and finally, the persistent, refusal of the defendant to have any matrimonial intercourse with the plaintiff as husband and wife. The corroboration in this regard was merely the testimony of other witnesses that the parties occupied separate bedrooms in the house, and was not of the character and degree required by the code section relating to corroboration in divorce cases. [2] We are not unmindful of the fact that the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties themselves. Nevertheless, the parties to a divorce action are not thereby relieved from the necessity of complying with the mandate of the law.

From a careful reading of the lengthy record, the trial appears to have been conducted by the parties on the theory that extreme cruelty was the real issue between them. Near the conclusion of the trial, the court gave an intimation that the finding should be on the ground of desertion, predicated on the failure of defendant to grant the marital rights that the plaintiff was entitled to. The court reached the conclusion, and so stated that "the testimony shows no adequate cause for an entire cessation of sexual relations, and the testimony fairly shows it."

[3] From our examination of the lengthy record we must disagree with the learned judge of the court below. There was no testimony, nor were any facts elicited, tending to show that the health or physical condition of the defendant did

not make his refusal to have reasonable matrimonial intercourse reasonably necessary. The burden of establishing this fact rested on plaintiff. (*Hayes v. Hayes*, 144 Cal. 625, [78 Pac. 19].) There must be a finding in such cases as to whether or not just cause for such refusal exists. (*Mayr v. Mayr*, 161 Cal. 134, [118 Pac. 546].) In the instant case plaintiff did not meet the burden imposed on her, and her case was not assisted by that of defendant, whose own testimony was against such a finding.

The finding of the court in the language of the complaint is not therefore a sufficient finding on the facts attempted to be proved. (*Devoe v. Devoe*, *supra*.) Furthermore, had the court used appropriate language in the finding to cover the facts required by the first portion of section 96 (*supra*), the evidence would not be sufficient to support it.

[4] The general allegation of the complaint hereinbefore set forth, in the absence of a demurrer for a definite statement of the facts, is not now subject to the objection for the first time on this appeal, that it does not inform defendant that the desertion was intended to be established under the first provision of section 96. (*Sheridan v. Sheridan*, 134 Cal. 88, [66 Pac. 73].)

As the case must be reversed for failure of the proof to support the finding as to the desertion, we will not comment in detail on the evidence relied on by respondent to corroborate the testimony of plaintiff, as to her residence. Suffice to say, that we are of the opinion that it is sufficient under the liberal rule laid down in *MacDonald v. MacDonald*, 155 Cal. 674, [25 L. R. A. (N. S.) 45, 102 Pac. 927]. On a retrial of the case such corroborating evidence should appear in proper order and sequence. The appellate court should not have to minutely examine the testimony of a multitude of witnesses, that it may, here and there, pick out fragments of proof, which, when pieced together, will support a finding of the trial court.

No other points made on the appeal require examination. The judgment and decree are reversed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 2947. Second Appellate District, Division One.—April 5, 1919.]

JOHN LAPIQUE, Petitioner, v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al., Respondents.

[1] **APPEAL — SETTLEMENT OF ADDITIONAL TRANSCRIPT — AUTHORITY OF TRIAL COURT.**—When a reporter's transcript to be used on appeal from a judgment has been regularly allowed and settled by the trial judge, the court's duty as well as its authority to settle a transcript has been exhausted, and thereafter the appellant is not entitled in the ordinary course of procedure to demand the settlement of an additional statement based upon the reporter's certificate to the correctness of a document containing matter additional to that contained in the settled transcript.

PROCEEDING in mandate to compel a trial judge to certify to the correctness of a reporter's transcript. Dismissed.

The facts are stated in the opinion of the court.

John Lapique, *in pro. per.*, for Petitioner.

H. L. Dunnigan, Haas & Dunnigan and J. J. Wilson for Respondents.

CONREY, P. J.—Application by John Lapique for a writ of mandate to compel the respondent judge to certify to the correctness of a reporter's transcript made pursuant to the demand of said Lapique, against whom judgment had been entered in an action wherein he was defendant, from which judgment he has an appeal pending in the supreme court. After alternative writ issued and an answer filed by the respondents, this matter has been submitted upon evidence taken by this court.

The judgment was entered on the eighteenth day of December, 1917. Within ten days thereafter, Lapique served and filed his notice of intention to move for a new trial, and filed his notice to the clerk requesting a reporter's transcript.

[1] The petition herein alleges that the court reporter made a transcript and certified to the truth and correctness thereof; that thereafter, on July 2, 1918, petitioner believed said transcript to be full, true, and correct, and that on that

day respondent judge, who tried the case, made an order settling and allowing said transcript as a part of the record, but that said order was made without notice having been given as required by section 953a of the Code of Civil Procedure; that on or about August 1, 1918, petitioner found that said reporter's transcript was defective, and on August 15, 1918, he demanded of the reporter a further transcript, in response to which the reporter did, on the twenty-ninth day of August, 1918, certify a further reporter's transcript; that on August 30, 1918, a notice was served on plaintiffs' attorneys and filed, stating that said reporter's transcript would be presented for allowance and settlement before the court on the fourth day of September, 1918; that on the fourth day of September the matter was continued until the 5th of September, 1918, and on the 5th of September was continued until the sixth day of that month; that at the hearings thereof Haas & Dunnigan, attorneys for the plaintiffs, did not appear; that on the sixth day of September, 1918, the trial judge refused to certify to the truth and correctness of said reporter's transcript on the grounds, "first, that the order appealed from is not an appealable order, and, second, that the transcript is not complete in that it does not set forth the title of the court and cause"; that said reporter's transcript is a full, fair, and correct transcript of the various proceedings described in the demand for transcript.

The evidence received herein shows that, as stated in the petition, an order of settlement was made by the judge on July 2, 1918, and that the same was made without notice; that on the third day of July, 1918, Lapique filed in the superior court an affidavit setting forth the fact that said order of July 2, 1918, had been made without notice, and thereupon an order was made, which was duly served upon the plaintiffs' attorneys, requiring them to appear before the court on the sixth day of August, 1918, at 9:30 A. M., to show cause why the reporter's transcript "settled and allowed by the trial court without notice on the second day of July, 1918, should not be allowed to stand, settled and allowed by the trial court on July 2, 1918," in said action; that at the time specified in said action to show cause the matter was continued to Tuesday, August 13, 1918, at 9:30 A. M. The minutes of the court for August 13th show that at the time to which said matter had been continued, John Lapique appeared in court

in propria persona, plaintiffs' attorneys not appearing, and "order to show cause granted by the court (Judge Valentine), and reporter's transcript settled and allowed by the court." Under that date a statement of such settlement and allowance, signed by the judge, appears at the end of the transcript. The evidence herein further shows that the reporter's transcript, certified, settled, and allowed as above stated, was filed in the supreme court on the twenty-third day of August, 1918. (Supreme Court No. L. A. 5837.)

It thus appears that petitioner's demand upon the reporter for a further transcript of the proceedings in question, which demand he alleges that he made on the fifteenth day of August, 1918, was not made until after the trial judge, after due notice and on request of the petitioner, had regularly allowed and settled the transcript which had been duly and regularly certified by the reporter; and that petitioner's demand upon the lower court and the judge thereof for allowance and settlement of such "further reporter's transcript" was not made until after the original duly certified transcript had been filed in the supreme court, where the appeal then was and now is pending. The court's duty as well as its authority to settle a transcript had been exhausted. If the order of settlement was made through mistake, inadvertence, surprise, or excusable neglect of the party who demanded the transcript, it may be that upon application made as required by section 473 of the Code of Civil Procedure, he might have been relieved from such order. No such application appears to have been made. Petitioner seems to have relied upon the mistaken theory that, without any special showing of reasons for relief in the matter, he was entitled in the ordinary course of procedure to demand the settlement of an additional statement based upon the reporter's certificate to the correctness of a document containing matter additional to that contained in the settled transcript.

Petitioner's contentions herein are without merit, and the proceeding is dismissed.

Shaw, J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 5, 1919.

[Civ. No. 2626. Second Appellate District, Division One.—April 5, 1919.]

HAROLD W. HAUN, Respondent, v. THOMAS L. TALLY, Appellant.

- [1] NEGLIGENCE — ACTION FOR PERSONAL INJURIES — FALL OF FAN IN THEATER—RES IPSA LOQUITUR—INSTRUCTIONS.—Where a fan which was installed in a theater, and which was exclusively within the charge and control of the owner thereof, pulled or dropped away from its motor bearings and fell and injured one of the patrons, the accident was such as to make applicable, in an action against such owner for the injuries thus caused, instructions as to a presumption of negligence under the rule of *res ipsa loquitur*.
- [2] ID.—IMPROPER RELEASE OF EMPLOYEE.—The fact that the employee who installed the fan was improperly exculpated in such action is not a matter of which the owner, who was held liable, is in a position on appeal to complain.
- [3] ID.—SPECIAL DAMAGES — PROOF — INSTRUCTIONS.—In such action, the court properly instructed the jury that the expenses incurred by the plaintiff for services of physicians and the value of time lost were "subjects of direct proof, and are to be determined only on the evidence which the jury has before it," while the other elements of damage were from necessity left to the sound discretion of the jury.
- [4] ID.—PROOF OF NEGLIGENCE—INSTRUCTIONS.—In such action, where the general charge of the court as given advised the jury that the burden was upon the plaintiff to sustain the allegations made, there was no error of a substantial nature in refusing to give a particular instruction offered by the defendant which narrated the several things contained in the charging part of the complaint as constituting negligence and advised the jury that plaintiff was required to make proof thereof.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a motion for a new trial. Curtis D. Wilbur, Judge. Affirmed.

The facts are stated in the opinion of the court.

Delphin M. Delmas for Appellant.

Schweitzer & Hutton for Respondent.

JAMES, J.—This appeal is taken by defendant Tally from an adverse judgment and from an order made denying his motion for a new trial.

The action was one for damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants. Tally was the owner of a theater; Darnell was his employee. On a certain day in the year 1914, Darnell, having received instructions from his employer so to do, procured and installed in one of the ventilating apertures of the theater an electrically propelled fan. On the ninth day of April of the same year plaintiff, after paying the required price of admission, was occupying a seat in the theater for the purpose of enjoying the entertainment. While he was so occupied the metal fan hereinbefore referred to became detached from the connecting motor and fell, striking the head of the plaintiff and inflicting quite a serious injury, compensation for which was assessed by the jury in this action at the sum of three thousand five hundred dollars. The points upon which appellant Tally relies are few and are succinctly stated in the opening brief of his counsel. They relate wholly to the matter of giving and the refusal to give certain instructions to the jury. It will be necessary to preface a consideration of the contentions urged against the judgment with a statement as to some portions of the allegations of the complaint and the whole charge as given by the court to the jury. That portion of the complaint wherein the particular negligence of the appellant was referred to is as follows: "On information and belief plaintiff alleges that the defendants, as a part of the furnishings and fixtures of the said theater, constructed, operated, installed, and maintained for the convenience and comfort of the patrons of the said defendant Tally, a two ventilating fan, alternating currents, of six blades. That said defendants did not exercise due care in the construction, operation, installation, and maintenance of the said fan, but constructed, operated, installed, and maintained the same in a careless and negligent manner, and in particular that the said fan was so constructed and installed, operated, and maintained that the same became loosened and did fall upon the patrons of said defendant Tally, and in particular on this plaintiff; that the said fan was so maintained, installed, and operated that the pressure of the running and operating the same caused the said fan

to pull away from the motor and its bearings, thereby causing the said fan to fall from its said bearings on said ninth day of April, 1914, striking and injuring the plaintiff."

The court instructed the jury generally that the burden of proving negligence in the case was upon the party alleging that negligence, and that unless the jury could find that the plaintiff had established negligence by a preponderance of the evidence the verdict should be for the defendants; it instructed the jury as to the particular negligence alleged and relied upon by the plaintiff, in the terms of that paragraph of the complaint from which we have already quoted. This instruction followed: "With relation to the operation, installation, and maintenance of the fan, the court instructs you it was the duty of the defendants to exercise ordinary care in the erection and installation of this appliance in the theater, and that that ordinary care is to be measured with relation, so far as this case is concerned, with relation to the effect upon the patrons of the theater. If, therefore, you find that the fan in question fell on April 9, 1914, and injured the plaintiff while he was a patron in the theater, it will be for you to determine whether or not such fall was the result of its negligent installation, operation, or maintenance. If you find that the fall was due to such maintenance, operation, or installation having been made in a negligent manner, your verdict in this case will be in favor of the plaintiff for such amount as you find from the evidence and under the instructions of the court he has suffered in the way of damages by reason of such negligence of the defendants, if you find they are negligent. The court further instructs you, gentlemen, in regard to the matter of negligence, that when a thing which causes an injury is shown to be under the management of the defendants and the accident is such as in the ordinary course of things does not happen if those who have the management, with proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care. To apply that doctrine to the case in question, if you find that the falling of the fan in question was such a thing as does not ordinarily happen if those who have the management thereof use proper care in the management and operation thereof, it affords *prima facie* evidence of negligence and would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that

prima facie presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants."

As to the matter of damages, an instruction was given which contained the following statement: "The expenses incurred by him for the services of physicians and surgeons and the value of any time lost are subjects of direct proof, and are to be determined only on the evidence which the jury has before it, and must not exceed the amounts specifically claimed therefor in the complaint. The other elements of damage are from necessity left to the sound discretion of the jury, but in no event must the amount of damages exceed the amount alleged, twenty-five thousand dollars."

[1] There was no dispute as to the fact that the fan fell and injured the plaintiff in the manner described, or that it fell by reason of pulling or dropping away from its motor bearings. The fan was exclusively within the charge and control of the defendant Tally, and the occurrence of the accident was such a one as to make applicable instructions as to a presumption of negligence arising under the familiar rule of *res ipsa loquitur*. Counsel says that because the complaint alleged that "the pressure of the running and operating the same caused the said fan to pull away from the motor and its bearings, thereby causing the said fan to fall," the plaintiff exhibited the fact that he had knowledge of what the alleged acts of negligence consisted and that such matters then demanded express proof, leaving no room for any presumption to be used in aid of the case of plaintiff. We do not concede that where specific acts of negligence are described, the plaintiff in making his proof will be deprived of the aid of the presumption of negligence in a proper case (respondent cites a case to the contrary, *Cassady v. Old Colony Street Ry. Co.*, 184 Mass. 156, [63 L. R. A. 285, 68 N. E. 10]); but that is not the situation here. Plaintiff alleges on information and belief that the fan was so negligently and carelessly constructed, installed, and operated as to become loose and fall, adding the further descriptive statement as to the pressure of running the fan having caused it to pull away from the motor bearings. Plaintiff did not attempt to particularize what the defects in the fan were which would permit the same when operated to become separated from the motor part of the appliance. The fan was intended to be operated, and if prop-

erly constructed and maintained would not have pulled away from its attachments while running. It is claimed, further, however, that by the instruction given on the question of the application of the rule of presumption of negligence the court went too far and in effect placed the burden upon the appellant to establish non-negligence, as against the presumption, by a preponderance of the evidence. It will be noted that the court in concluding that instruction stated to the jury that the *prima facie* case made out with the aid of the presumption "would justify a verdict in favor of the plaintiff unless the evidence in the case negatives that *prima facie* presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants." The argument of appellant impresses us with much force, and if we could consider the question an open one, we would be inclined to agree that the instruction was improper. In giving this particular instruction the court seems to have left out of view the requirement that the evidence of the plaintiff must preponderate in weight and that the defendant will be entitled to judgment where the countervailing evidence merely balances but does not overcome the case made by the plaintiff. Then, too, it might well be argued that proof to the "satisfaction" of the jury would require even more than a preponderance and reach almost to proof beyond a reasonable doubt. We can see little difference between that instruction—referring now only to the use of the words "establishes to your satisfaction"—and one considered by the supreme court in *Campbell v. Bradbury*, 179 Cal. 364, [176 Pac. 685]. The language there considered is said by the court to amount to a "reasonable doubt" instruction. However that may be, the supreme court in a number of cases has given consideration to instructions similar to that about which complaint is here made and has held that there was no error committed against a defendant by the giving thereof. (*Osgood v. Los Angeles Traction Co.*, 137 Cal. 280, [92 Am. St. Rep. 171, 70 Pac. 169]; and as to the general application of the rule: *Steele v. Pacific Electric Ry. Co.*, 168 Cal. 375, [143 Pac. 718]; *Wyatt v. Pacific Electric Ry. Co.*, 156 Cal. 170, [103 Pac. 892]; *Worden v. Central Fireproof Building Co.*, 172 Cal. 94, [155 Pac. 839].) On the other side of the question and in a case where the court did instruct the jury that the defendant was

only required to introduce sufficient evidence "to balance such a presumption without overcoming it by preponderance of the evidence," the supreme court declined, and no doubt properly so, to reverse the case upon the appeal of the plaintiff. The Osgood case, *supra*, however, directly meets the question which the instruction here considered proposes, by asserting that "this presumption (the presumption of negligence), which the law raises from proof of certain facts, is 'satisfactory if uncontradicted' (Code Civ. Proc., sec. 1963); and to meet it the evidence of defendant must show to the satisfaction of the jury that defendant was without any negligence on its part." We will there leave this question and hold that there was no error in the instruction, so holding only because we think that the decisions of the supreme court have foreclosed us against the exercise of any original judgment in the matter.

[2] Further complaint is made because the court advised the jury that the presumption of negligence hereinbefore referred to applied only to the appellant and not to Darnell, his employee. The evidence showed that Darnell was instructed to procure the fan and to install it, and that he followed instructions in that regard, although he was not an expert in such matters. The defendant's liability, assuming that negligence was shown in the installation or operation of the fan, cannot be questioned; that Darnell may have been improperly exculpated we think is a matter about which the appellant is not in a position here to complain.

[3] It is contended that the court erred in instructing the jury that the expenses incurred by the plaintiff for services of physicians and the value of time lost were "subjects of direct proof, and are to be determined only on the evidence which the jury has before it," in that there was left out of view the right of the jury to form its own opinion as to those elements of damage. No evidence was introduced by the defendant to contradict in any way the proof made by the plaintiff as to these matters. Strictly speaking, considering that the evidence referred to by the court would include the evidence as to the quantity of time lost by the plaintiff and the amount of services rendered by physicians and surgeons, the instruction was correct. The jury would have no right to go outside of the evidence to determine any of those things.

The court's intention no doubt was to place before the jury the fact that these matters were matters of particular damage, to support which particular proof was needed, whereas, as to other general elements of damage, the sound discretion of the jury would control. The instruction is so phrased and its language is quite clear.

[4] We do not think that there was error of a substantial nature in the court's refusing to give a particular instruction offered by appellant which narrated the several things contained in the charging part of the complaint as constituting negligence and advised the jury that plaintiff was required to make proof thereof. The general charge of the court as given advised the jury that the burden was upon the plaintiff to sustain the allegations made.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 4, 1919, and the following opinion then rendered thereon:

THE COURT.—In denying the application for a hearing in this court after decision by the district court of appeal of the second appellate district, division one, we are not to be understood as approving the instruction discussed in the opinion to the effect that the *prima facie* case of negligence made by the falling of the fan "would justify a verdict in favor of the plaintiff, unless the evidence in the case negatives that *prima facie* presumption, and establishes to your satisfaction that it was not the result of the negligence of the defendants." We think the italicized portion of this instruction was erroneous for the reason suggested in the opinion of the district court of appeal, namely, in leaving out the requirement that the evidence of the plaintiff must preponderate in weight and that the defendant will be entitled to judgment where the countervailing evidence merely balances but does not outweigh the case made by the plaintiff. But in view of the evidence and the charge of the court taken as a whole we cannot conceive that this defect in this particular instruction in any way

contributed to the verdict, and therefore are of the opinion that the error must be held to be without prejudice.

The petition for a hearing in this court is denied.

All the Justices concurred, except Wilbur, J., who did not participate.

[Civ. No. 2852. First Appellate District, Division One.—April 7, 1919.]

AUDITORIUM COMPANY (a Corporation), Appellant, v. C. BARSOTTI, Respondent.

- [1] **PARTNERSHIP — ACTION AGAINST — FINDING AS TO EXISTENCE OF — SUFFICIENCY OF EVIDENCE.**—In this action against three alleged members of a copartnership, there was sufficient evidence to support the finding of the trial court that a copartnership was not shown to have existed between the defendants so as to render one of them liable upon the obligations created as between the other two and the plaintiff.
- [2] **ID.—ADMISSIBILITY OF PAROL EVIDENCE.**—Where one of the defendants in such action had merely pledged his credit at a certain bank that the other two might secure certain money, in consideration of his receiving one-third of the profits to be derived from the enterprise contemplated by the other two defendants, and such money was to be repaid out of the first profits, the court properly admitted parol evidence to show that he was not a partner, notwithstanding the terms of the written agreement between the defendants strongly indicated that relationship between them, where the plaintiff had no knowledge of the existence of any partnership relationship between the three defendants and did not extend credit to them upon the belief that such relationship existed.
- [3] **ID.—WHAT CONSTITUTES—DIVISION OF PROFITS NOT SUFFICIENT.**—The mere oral agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them partners. It is the association of two or more persons for the purpose of carrying on business together which is the distinguishing feature of a partnership.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge. Affirmed.

The facts are stated in the opinion of the court.

Olin Wellborn, Jr., A. I. McCormick and Stephen Monteleone for Appellant.

Charles Baer for Respondent.

RICHARDS, J.—This action was commenced by the plaintiff against the defendants, who were alleged to be partners doing business under the firm name and style of the "Western Metropolitan Grand Opera Co.," to recover the aggregate sum of \$9,739.86 upon three separate counts, the first and second being upon accounts stated for the sums of \$2,490.34 and \$4,949.52, respectively, and the third count being for money had and received in the sum of two thousand three hundred dollars. The defendant D'Avigneau defaulted, and the action as to him was later dismissed. The defendants Barsotti and Patrizi answered separately, each denying that Barsotti was at any time a member of the alleged copartnership, but each alleging that the defendants Patrizi and D'Avigneau constituted its only members. The only issue presented upon this appeal is as to whether the defendant Barsotti was in fact a partner of his codefendants. The trial court found that he was not and rendered judgment accordingly in his favor. The plaintiff and appellant herein urges that the evidence is insufficient to support the findings and judgment of the court in this regard.

A review of the record in the case convinces us that the evidence is sufficient to fairly establish the following facts: During the year 1913 the defendants Patrizi and D'Avigneau were interested in the production of grand opera. In the spring of that year the former of these discussed with the officers of the plaintiff the matter of the organization of a company for the purpose of playing grand opera engagements in San Francisco and Los Angeles during that year. To that end Patrizi became associated with D'Avigneau, and on August 13, 1913, an agreement in writing was entered into between the officers of the plaintiff and Patrizi and D'Avigneau as parties of the second part by which the former were to advance to the latter the sum of seven thousand five hundred dollars on or before August 31, 1913, upon the express condition that the latter should secure on or before said date

the additional sum of twelve thousand dollars, which combined sums were to be used for the purpose of organizing and operating an opera company to fill said engagements. Patrizi and D'Avigneau endeavored to raise this sum, said sum to be supplied by them by subscription, but failed in this endeavor, whereupon D'Avigneau suggested to Patrizi that he attempt to obtain the money from his friend Barsotti. They discussed between themselves the inducement apparently in the way of a bonus which should be offered to Barsotti to furnish this money, and agreed to offer him one-third of the profits of the San Francisco and Los Angeles engagements. Patrizi went to Barsotti with the proposition and induced him to advance the sum of ten thousand dollars. Barsotti and Patrizi both testify that this was to be an advance to be repaid out of the first profits earned in these engagements. Thereupon Patrizi drew up the document which is mainly relied upon by the appellant herein as being the articles of the alleged partnership, which document was signed by Patrizi, D'Avigneau and Barsotti. It recited that it was the intention of the parties to it to establish an operatic organization to be known as the "Western Metropolitan Opera Company," to give an opera season in San Francisco and in Los Angeles, and that it was agreed by them that "each will hold one-third interest in said enterprise, and that if any profits will be derived from same at the end of the contemplated season, said profits are to be divided equally among said three parties." As to the part which Barsotti was to perform in this undertaking, it was agreed: "Dr. C. Barsotti will help Messrs. Patrizi and D'Avigneau in securing a certain sum of money of about ten thousand dollars by a note to be signed also by E. Patrizi and E. D'Avigneau, and to furnish certain bonds and guarantees which may be needed to help the work and development of the enterprise." The evidence further shows that after the execution of this agreement, Barsotti did pledge his credit at a certain San Francisco bank by which the sum of ten thousand dollars was realized, and that thereafter the two defendants Patrizi and D'Avigneau went ahead with the execution of the contract which they had entered into with the plaintiff's officers. The evidence sufficiently shows that as to the transactions between these two defendants and the plaintiff through its officers Barsotti was never consulted, nor his consent or signature asked or given in the making or

signing of agreements or in any of the negotiations between these parties, and we think the evidence also sufficiently shows that neither the plaintiff nor any of its officers were aware of any such relation as that of partnership between Barsotti and his two codefendants until after the liabilities upon which this action is predicated had arisen, and that at no time did the plaintiff deal with or extend credit to his said codefendants upon the belief that Barsotti was their copartner. While upon the witness-stand both Barsotti and Patrizi denied the existence of such copartnership, and both testified that the understanding and agreement was that the money secured through Barsotti's credit and accommodation was to be repaid to him whether the opera enterprise was successful or not.

[1] Upon the face of the foregoing state of facts we think there was sufficient evidence to support the finding of the trial court that a copartnership was not shown to have existed between Patrizi, D'Avigneau and Barsotti so as to render the latter liable upon the obligations created as between the former two persons and the plaintiff herein. It is true that the written agreement upon which the plaintiff relies as conclusively establishing such relation, standing alone, would strongly support such a conclusion; and while, as between the parties to it, or as between them and third persons extending credit upon its face as forming such partnership relation, the parties to it would not be permitted to contradict its terms, this principle does not apply to cases where the question as to what the real understanding between the parties signing the agreement was, arises as between them or any of them and outside parties who have in their dealings not known of or depended upon the existence of a partnership relation.

[2] Under such conditions the parties may be permitted orally or by circumstances to show that no partnership in fact was contemplated between them, notwithstanding the terms of their written agreement. It is to be noted in this connection that the words "partners" or "partnership" are nowhere to be found in the writing upon which the plaintiff mainly relies, but that the partnership, if any, is to be inferred from the fact that the parties to it were to share equally in the profits, if any, of the enterprise which the two parties other than Barsotti were to actively engage in. [3] It has been quite uniformly held that the mere agreement between two or more persons to divide the profits of an undertaking

is not sufficient to constitute them partners, but that it is "the association of two or more persons for the purpose of carrying on business together," which is the distinguishing feature of a partnership. (*Hammond v. Borgwardt*, 126 Cal. 611, [59 Pac. 121]; *Coward v. Clanton*, 122 Cal. 451, [55 Pac. 147]; *Vanderhurst v. De Witt*, 95 Cal. 57, [20 L. R. A. 595, 30 Pac. 94]; *Cadenasso v. Antonelle*, 127 Cal. 382, [59 Pac. 765]; *Title Insurance & Trust Co. v. Grider*, 152 Cal. 746, [94 Pac. 601].) An instructive case strongly resembling, in some of its aspects, the case at bar, is that of *Gille H. & I. Co. v. McCleverty*, 89 Mo. App. 158, in which the court says: "We think that the contract shows it to have been the intention that McCleverty should advance a certain amount of money, which Harrison was to use in his mercantile business, and if successful he was to return it with one-third of the profits; and if unsuccessful, and the advancement was lost, then that was to be the end of the matter as far as the former was concerned. It is true that the contract does not expressly provide that Harrison was to return the advancement, but we think that fact may be fairly inferred from all the facts and circumstances disclosed by the transaction. Our conclusion is that the transaction between the defendants did not create the partnership relation, but rather that of debtor and creditor."

It will thus sufficiently appear that it is our conclusion that the findings and judgment of the trial court are amply supported by the evidence in the case.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

[Civ. No. 2749. First Appellate District, Division Two.—April 8, 1919.]

CITY STREET IMPROVEMENT COMPANY (a Corporation), Respondent, v. HENRY SILVERSHIELD et al., Appellants.

[1] APPEAL—ALTERNATIVE METHOD—SECTION 953c, CODE OF CIVIL PROCEDURE, CONSTRUED.—Section 953c of the Code of Civil Procedure, governing the taking of appeals under the alternative procedure, is positive in its requirements.

APPEAL from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge. Affirmed.

The facts are stated in the opinion of the court.

W. F. Cowan for Appellants.

Platt Kent for Respondent.

BRITTAIN, J.—The appeal, upon the alternative procedure, is from a judgment upon a private contract for street work in the city of Santa Rosa. In the opening brief there is no appendix, and the only pretense of setting out any part of the record, if indeed it is a part of the record, is a mutilated excerpt from a part of the private contract. There is a statement that one of the principal points upon which the appellants rely is the construction of the contract. The respondent's brief consists of a single paragraph asking that the judgment be affirmed for the reason that the appellants have not printed in their brief the portion of the record required for the information of the court, citing Code of Civil Procedure, section 953c, and *Miller v. Oliver*, 174 Cal. 404, [163 Pac. 357], and stating that the appeal appears to have been taken solely for delay.

In the closing brief is a statement that counsel for the appellants have been assured several times by courts of appeal when presenting cases that they always make a practice of going fully into the transcript, and, further, in order that there might be no dereliction, in the closing brief they set forth certain matter, which may or may not have been another part of the contract in suit so far as appears from the brief, consist-

ing of three questions with their answers, which, standing alone, are entirely unintelligible. There is also set forth what is designated the pretended acceptance by the city of Santa Rosa.

[1] Section 953c of the Code of Civil Procedure is positive in its requirements. It has frequently been construed by both the supreme court and the district courts of appeal. *Müller v. Oliver* was decided more than a year before the appellants' opening brief in this case was filed. In that case the supreme court awarded damages of one hundred dollars against the appellant for a frivolous appeal. The disregard by the appellant in that case of the provisions of section 953c of the Code of Civil Procedure was not more marked than that of the appellants in the present case. (*Estate of Keith*, 175 Cal. 26, [165 Pac. 10]; *Welk v. Sorenson*, 179 Cal. 604, [178 Pac. 498]; *Whiting-Mead Commercial Co. v. Richards*, ante, p. 266, [180 Pac. 633].) The record has been examined and it fails to disclose merit in the appeal from a judgment of \$108.05, interest and costs.

The judgment is affirmed, and it is adjudged that respondent recover from the appellants the sum of \$50 for the taking of a frivolous appeal.

Langdon, P. J., and Haven, J., concurred.

[Civ. No. 2775. First Appellate District, Division Two.—April 8, 1919.]

ANGELO POZZI, Respondent, v. ALPINE EVAPORATED CREAM COMPANY, Appellant.

[1] APPEAL — CONFLICTING EVIDENCE — UNWARRANTED PROCEEDING.—

Where the evidence is clearly conflicting, and there is ample evidence to justify the verdict of the jury, an appeal from the judgment is an unnecessary and unwarranted proceeding, in the absence of some error occurring at the trial.

APPEAL from a judgment of the Superior Court of Monterey County. J. A. Bardin, Judge. Affirmed.

The facts are stated in the opinion of the court.

Zabala & Sargent for Appellant.

C. F. Lacey for Respondent.

LANGDON, P. J.—[1] This is an appeal by the defendant from a judgment in favor of plaintiff for \$3,577.60, alleged to be due as the purchase price of milk delivered by plaintiff and his assignors to the defendant company. There was no dispute about either the delivery or the value of the milk. As a defense, defendant contended that plaintiff and his assignors had entered into oral agreements to deliver to defendant all milk produced at their dairies for a period of one year in consideration of the payment of the highest market price therefor by the defendant to them; that the plaintiff and his assignors delivered milk for a period of approximately three months only and then refused to deliver longer. Defendant alleged that by reason of the failure of plaintiff and his assignors to deliver according to their alleged contracts, defendant has been damaged in the sum of three thousand dollars, and defendant filed a counterclaim asking for that amount. Appellant admits that the only question in the case is: Did the plaintiff and his assignors agree to ship the milk produced on their several dairies to defendant for a period of one year? It then contends that the verdict is contrary to the evidence. From an examination of the evidence, it appears that it was clearly conflicting and that there was ample evidence to justify the verdict of the jury. Under such circumstances, and in the absence of a single assignment of error occurring at the trial, it would seem that the rule of law is sufficiently clear and well established to make an appeal to this court an unnecessary and unwarranted proceeding.

The judgment is affirmed.

Haven, J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 5, 1919.

All the Justices concurred.

[Civ. No. 2662. First Appellate District, Division One.—April 8, 1919.]

GEORGE W. MCGINN, Respondent, v. T. C. VAN NESS, Jr., et al., Appellants.

- [1] **STREET LAW — SAN FRANCISCO ORDINANCE — ACTION TO FORECLOSE LIEN — PROPER APPORTIONMENT OF ASSESSMENT — INSUFFICIENT ANSWER.**—In this action to foreclose a lien for street work under public contract there was no denial of plaintiff's averment that the board of public works "duly and regularly" made an assessment to cover the sum due for the work performed in conformity with the provisions of the San Francisco Street Improvement Ordinance (No. 2430), sufficient to raise the issue as to whether or not such board properly apportioned the assessment as directed by such ordinance; and the averment of the defendants' answer was ineffectual to present such issue.
- [2] **ID. — DEFECTIVE ASSESSMENT — IRREGULARITY — REMEDY.**— Even though such assessment was defective in that it was not properly apportioned as directed by the ordinance, the defect was not such as would render the assessment void upon its face, but at most was only an irregularity which could and doubtless would have been corrected upon an appeal to the proper board under section 21 of the ordinance in question.
- [3] **ID.—ERRORS CONSTITUTING DEFENSE TO ACTION.**—It is only such errors as are jurisdictional and which appear upon the face of the assessment that may be taken advantage of upon the trial without an appeal having been first made to the board.
- [4] **ID.—RECORDATION OF WARRANT, ASSESSMENT, AND DIAGRAM—COLLECTIVE INDORSEMENT.**—Where the record shows that the warrant, assessment, and diagram were indorsed as having been duly recorded on the same day on which they were filed of record, the fair intendment is that this indorsement was made upon the originals where it should appear. The fact that such indorsement was collective as to all three of these documents and not made upon each separately is immaterial.
- [5] **ID.—FAILURE OF SECRETARY TO AUTHENTICATE RECORD.**—The failure of the secretary of the board of public works to attach his signature to the record of the return of the assessment and warrant does not render the lien invalid nor prejudice the holder of the warrant.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. E. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Wm. H. Chapman and R. M. F. Soto for Appellants.

Fabius T. Finch for Respondent.

RICHARDS, J.—This is an action to foreclose a lien for street work under a public contract affecting the property of the defendants. The assessment was made under the procedure provided by Ordinance No. 2439, New Series, of the city and county of San Francisco, approved September 4, 1913, under and by virtue of the power given to the supervisors of that municipality by section 33, chapter II, of article VI of its charter. The trial court decreed a foreclosure of said lien, and from such decree the defendants have prosecuted this appeal.

The first point insisted upon by the appellants is that of the insufficiency of the complaint as tested by a general demurrer, but in view of the fact that the appellants concede in their opening brief that the complaint herein as amended is substantially in the same form as the complaint in the case of *Bienfeld v. Van Ness*, 176 Cal. 585, [169 Pac. 225], and that the supreme court in that case disposed of practically every point herein urged as to the insufficiency of the complaint adversely to the appellants, it is not necessary to further consider this phase of the case.

[1] The next contention of the appellants requiring consideration is the claim that the board of public works is not shown to have properly apportioned the assessment as directed by the ordinance. The complaint in that behalf alleges that the board of public works "duly and regularly made an assessment to cover the sum due for the work performed and specified in conformity with the provisions of the charter of San Francisco and in accordance with the provisions of Ordinance No. 2439." We do not find any sufficient denial of this averment to raise an issue involving the point urged in the appellants' contention, and we regard the averment of the defendants' answer relied upon by them as ineffectual to present such issue. (*Beckett v. Morse*, 4 Cal. App. 232, [87 Pac. 408].)

[2] But even if it were to be assumed that the assessment was defective in the respect claimed, it was not such a defect

as, in our opinion, would render the assessment void upon its face, but was at most only an irregularity which could and doubtless would have been corrected upon an appeal to the proper board under section 21 of the ordinance in question.

[3] It is only such errors as are jurisdictional and which appear upon the face of the assessment that may be taken advantage of upon the trial without an appeal having been first made to the board. (*Chase v. Trout*, 146 Cal. 357, [80 Pac. 81]; *Girvin v. Simon*, 116 Cal. 604, [48 Pac. 720]; *McLaughlin v. Knoblock*, 161 Cal. 676, [120 Pac. 27]; *Ramish v. Hartwell*, 126 Cal. 443, [58 Pac. 920].)

[4] The next contention of the appellants is that the record shows that the warrant, assessment, and diagram were not properly recorded as required by the terms of the ordinance. In thus stating the condition of the record we think counsel for the appellants are in error. The record shows that the warrant, assessment, and diagram were indorsed as having been duly recorded on the same day on which they were filed for record. The fair intendment from this showing is that this indorsement was made upon the originals where it should appear. The fact that such indorsement was collective as to all three of these documents and not made upon each separately is too technical to deserve consideration. [5] The case of *Bienfeld v. Van Ness*, *supra*, seems to dispose of the objections of the appellants as to the sufficient authentication of the return of the assessment and warrant, also to hold, and that the failure of the secretary of the board to attach his signature to the record does not render the lien invalid nor prejudice the holder of the warrant. In that case, also, practically all of the other objections which the appellants herein make to the sufficiency of this assessment and the lien sought to be foreclosed in this action are held to have been rendered unavailing by the following provision of the ordinance, namely: "No assessment; warrant, diagram, or affidavit of demand and nonpayment after issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improvement posted as in this ordinance provided." (*Bienfeld v. Van Ness*, *supra*; *Chase v. Trout*, *supra*.)

This disposes of every material point urged by the appellants upon this appeal.

Judgment affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 5, 1919, and the following opinion then rendered thereon:

THE COURT.—The application for a hearing in this court after decision by the district court of appeal of the first appellate district, division one, is denied, without reference to any question of the correctness of what is stated in the opinion in the paragraph commencing with the words, viz.: "But even if it were to be assumed that the assessment was defective in the respect claimed," etc.

All the Justices concurred.

[Civ. No. 1950. Third Appellate District.—April 8, 1919.]

CRENSHAW BROS. AND SAFFOLD (a Copartnership, etc.), Respondents, v. **SOUTHERN PACIFIC COMPANY** (a Corporation), Appellant.

- [1] **COMMON CARRIERS—BILLS OF LADING—LIMITATION OF LIABILITY—VALIDITY OF PROVISION.**—A provision in a bill of lading that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under the bill of lading . . . whether or not such loss or damage occurs from negligence," is valid as to transactions involving interstate commerce.
- [2] **ID.—SEPARATE CHARGE FOR REFRIGERATION—EFFECT ON CONTRACT.**—Such covenant in a contract in connection with the shipment of fruit is not affected by the fact that there is a separate and distinct charge for refrigeration, although the loss may be from imperfect refrigeration, where such refrigeration is inseparably connected

with the transportation of the fruit and is an essential part of the transaction.

- [3] **ID.—LOSS—MEASURE OF DAMAGES.**—Under such form of contract the shipper can recover only his actual loss instead of his full compensatory damage.

APPEAL from a judgment of the Superior Court of San Joaquin County. D. M. Young, Judge. Modified and affirmed.

The facts are stated in the opinion of the court.

Arthur L. Levinsky for Appellant.

L. T. Hatfield for Respondents.

BURNETT, J.—The action was brought to recover damages for breach of contract in relation to the shipment of three separate and distinct consignments of grapes from three different points in California to Tampa, Florida. Briefly stated, the damage claimed was due to imperfect refrigeration, rough handling of the fruit, and unnecessary delay in transportation. The court found in favor of plaintiffs, and the appeal is taken from the judgment on a bill of exceptions. Only one question is open for consideration in this court, and that is, What is the measure or standard by which the amount of compensation is to be determined? Every other question was waived by appellant in the court below, and, of course, on principle as well as authority, we must accord full significance to that waiver.

[1] The controversy revolves about this provision in the bill of lading: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under the bill of lading . . . whether or not such loss or damage occurs from negligence."

There is no dispute that the transaction involved interstate commerce or that appellant had filed with the interstate commerce commission its schedule of rates, fares, and charges for transportation as required by the interstate commerce law. Nor is it claimed that any fraud or want of good faith characterized the execution of the contract between the parties

for the shipment of the fruit. Respondents, however, do make the contention that said provision is void because against sound public policy.

A detailed consideration of the various objections to the legal operation and effectiveness of the provision is not required, since the validity of such contract has been so directly and positively affirmed by the courts, including the supreme court of this state and the United States supreme court, that the question is no longer open to discussion. Of course, the circumstances and conditions of each particular case must be regarded in the interpretation of the contract, but it cannot be regarded as unlawful or inoperative.

In *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, [57 L. Ed. 683, 33 Sup. Ct. Rep. 391, see, also, Rose's U. S. Notes], a box of household goods was lost in transportation and the shipper sued to recover its value. The main defense was that the liability was limited to the sum of five dollars per hundred weight, the value agreed upon at the time and place of shipment. Many cases are reviewed in the opinion and the court declares: "But when a shipper delivers a package for shipment and declares a value either upon request or voluntarily and the carrier makes a rate accordingly, the shipper is estopped, upon plain principles of justice, from recovering, in case of loss or damage, any greater amount. The same principle applies if the value be declared in the form of a contract. . . . The ground upon which such a declared or agreed value is upheld, is that of estoppel." It is not important that in the case at bar the agreement did not specify the value. It left that to be ascertained, but limited it to a particular time and place. The same principle would, manifestly, apply as though the parties had stated the exact value. Indeed, as we shall see hereafter, there is no controversy as to the value of the property at the time and place of shipment. Nor is there any dispute that the shipper had the option to demand, on the condition of paying a greater rate, a more favorable contract as to the liability of the carrier.

In *Georgia etc. Ry. Co. v. Blish Milling Co.*, 241 U. S. 188, [60 L. Ed. 948, 36 Sup. Ct. Rep. 541], while the main questions discussed were whether the plaintiff's exclusive remedy was against the initial carrier and whether the action was barred, the court declared: "But the parties could not waive the terms of the contract under which the shipment was made

pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff and regulation."

In *Pennsylvania R. R. Co. v. Olevit Bros.*, 243 U. S. 574, [61 L. Ed. 908, 37 Sup. Ct. Rep. 468], the validity of such provision was conceded by both parties, the controversy being over the questions as to the meaning of the phrase "lawful holder" in what is known as the Carmack amendment to the Interstate Commerce Act, whether there was any evidence of negligence on the part of the defendant, and whether plaintiff was entitled to recover the freight paid by it; the court, however, after quoting said provision from the bill of lading, said: "Some of the bills of lading do not contain this provision, but it was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment and that such measure should be read into all of the bills of lading. As plaintiff further says, to recover the damages sustained by it based upon this value, plaintiff must receive from defendant the difference between the value and the proceeds of the sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight."

Gulf etc. Ry. Co. v. Texas Packing Co., 244 U. S. 31, [61 L. Ed. 970, 37 Sup. Ct. Rep. 487], involved the shipment of poultry, the goods having been damaged by reason of the negligence of the carrier, and sold by the shipper at the point of destination. One of the vital questions considered was whether the trial court erred in giving to the jury the following instruction: "If you find for the plaintiff you will assess the damages at the difference between the invoice price of said poultry, to wit, the sum of \$22,238.56, and the value of said poultry at the time the same was delivered to plaintiff, or its agents, the Western Cold Storage Company in Chicago, by the carrier with six per cent interest per annum, from Jan. 15, 1911."

The court declared: "We think that in taking this sum as the basis of computing damages the trial court did but enforce the stipulation in the bills of lading. . . . We think the court properly charged the jury to take the difference between the invoice price and the value of the poultry at the time the same was delivered in Chicago in arriving at the amount of

damages. . . . Apart from the stipulation of these bills of lading, the ordinary measure of damages in cases of this sort is the difference between the market value of the property in the condition in which it should have arrived at the place of destination and its market value in the condition in which, by reason of the fault of the carrier, it did arrive. (*New York etc. R. R. Co. v. Estill*, 147 U. S. 616, [37 L. Ed. 292, 13 Sup. Ct. Rep. 444, see, also, Rose's U. S. Notes].) The stipulations of these bills of lading changed the rule in the requirement that the invoice price at the place of shipment should be the basis for assessing the damage."

The case of *Boston & Maine R. R. v. Piper*, 246 U. S. 439, [Ann. Cas. 1918E, 469, 62 L. Ed. 820, 38 Sup. Ct. Rep. 354], is not opposed to the foregoing. Therein it was held that a provision exonerating the carrier from losses incurred by the shipper in consequence of the negligence of the former is illegal and not binding upon the shipper, and "is not within the principle of limiting liability to an agreed valuation which has been made the basis of a reduced rate."

In no decision to which our attention has been called has the subject received more careful and thorough consideration than in *Zoller Hop Co. v. Southern Pacific Co.*, 72 Or. 262, [143 Pac. 931], decided by the supreme court of Oregon. Therein it is said: "It is reasonable and natural that the care and risk involved in the carriage of goods should be in proportion to their value. It is proper and legitimate that the greater the risk and responsibility, the greater should be the recompense to the one concurring therein. The converse is equally true, so that consequent damages are reduced in proportion to the lesser responsibility for the goods. The risk and the rate have a logical and corresponding relation to each other, based upon the value of the property intrusted to the carrier. If it is lawful to agree in advance upon a more or less conventional value of the chattels for the purpose of securing cheaper rates in favor of the shipper, it is quite as proper to use the same value as a basis upon which to compute damage for the breach of the contract . . . It accords with sound doctrine, therefore, that at the outset the parties may in good faith fix upon the value of the property for all contingencies likely to arise in the transaction, and this does not in any way relieve the carrier from the results of his own negligence."

In 10 Corpus Juris, 57, it is said: "Before the enactment of the Carmack amendment the greatest confusion existed as to whether a limitation of the carrier's liability for loss or injury to a specified value was valid in case the shipment was lost or injured by reason of the negligence of the carrier . . . The effect of the Carmack amendment is, of course, to make the rule uniform in all jurisdictions of the United States, so far as interstate shipments are concerned, and to render valid a limitation of the character under consideration, whether the loss or injury was due to the carrier's negligence or not."

Furthermore, it is said that even in states where such a contract is held void under statutes prohibiting carriers from limiting their common-law liability, "a contract for an interstate shipment, made in a state where such a statute is in force, is valid under the Carmack amendment, inasmuch as the decisions of the federal courts prior to the amendment held such contracts valid."

Our own supreme court has also directly upheld the validity of such agreement.

In *Pierce v. Southern Pacific Co.*, 120 Cal. 156, [40 L. R. A. 350, 52 Pac. 302], it was declared that effect must be given to the contract of the parties making the invoice price at the point of shipment the measure of damage, "and where no invoice price was actually made out, and agreed upon, that expression must be understood as indicating the actual cash value of the trees at the point of shipment, when loaded and ready for transportation."

The question was fully considered in *Donlon Bros. v. Southern Pacific Co.*, 151 Cal. 763, [12 Ann. Cas. 1118, 11 L. R. A. (N. S.) 811, 91 Pac. 903], involving the shipment of horses, and the court said: "The contract is one in which the valuation of the property was agreed to and for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability. It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to and, of course, the agreed valuation must be deemed to be the actual valuation of the contract—its actual valuation for all purposes of the contract."

[2] Nor do we understand how this covenant in the contract is affected in the least by the fact that there was a

separate and distinct charge for the refrigeration. The charge was distinct, but the refrigeration itself was inseparably connected with the transportation of the fruit and was an essential part of the transaction. The loss from imperfect refrigeration was damage for which the carrier was liable on that bill of lading and the condition to which we have reference applied "to *any* loss or damage for which the carrier is liable." The fact that there was only one rate for the refrigeration does not derogate from the validity of the contract, since the difference in the rate for the transportation would be a sufficient consideration to uphold it.

Another important question is involved in the construction and application of this provision of the contract.

As to the first count in the complaint the court found that the grapes were sold to the best advantage for the sum of \$980; that the amount of the freight charge was \$496.12 and of the refrigeration was \$95; that the invoice value was \$783; that if the fruit had arrived in time and uninjured, it could have been sold for \$1,957.50. The court concluded that the plaintiffs suffered damage to the extent of the difference between said \$1,957.50 and \$980, to wit, the sum of \$977.50, for which judgment was allowed.

As to the second count, the court found that the fruit was sold for the sum of \$1,097.75, and that if it had been received on time and in a marketable condition it would have brought the sum of \$1,860. It was also found that the invoice price was \$930, the freight charge \$494.97, and the refrigeration charge the sum of \$95. The damage allowed was, therefore, the sum of \$762.25.

In reference to the third shipment, it was found that it was sold for \$1,133.75, that if there had been no breach of the contract, it could have been sold for \$2,557.50; that the invoice price was \$1,255.50, the charge for transportation was \$494.97, and for refrigeration was \$95. The court allowed as damages the difference between the selling price and what it would have brought, to wit, the sum of \$1,423.75.

It is the claim of appellant that, in any event, under said provision of the bill of lading the extent of the recovery is measured by the actual loss, which is determined by the difference between the invoice price with the freight and refrigeration charge added, and the selling price, and that it was entirely improper for the court to consider what the fruit

might have sold for at the point of destination. Under this view, for the first mentioned shipment, the account would stand as follows:

Actual cost of fruit.....	\$783.00
Freight paid	591.12

\$1,374.12

Fruit brought	980.00
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Loss	\$394.12
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For the second cause of action we would have:

Cost	\$930.00
Freight paid	589.97

\$1,519.97

Fruit brought	1,097.75
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Loss	\$422.22
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The third would stand as follows:

Cost	\$1,255.50
Freight paid	589.97

\$1,845.47

Fruit brought	1,133.75
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Loss	\$ 711.72
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[3] Another view of the construction of said provision, which supports the conclusion of the lower court, suggested by respondents, is that said invoice price simply provides the *maximum* amount to be recovered in case of loss, but does not prevent the recovery of the difference between the selling price and what the goods could have been sold for if there had been no injury, provided such difference does not exceed said invoice price. Such seems to be the view taken by the supreme court of this state in the very recent case of *Olcovich v. Grand Trunk Ry. Co.*, 179 Cal. 332, [176 Pac. 459]. Therein it is said: "While there are late cases holding that the measure of damages under such a bill of lading as that herein is the difference between the cost price at the shipping point and the selling price of the injured freight at the point of destination . . . we prefer to follow the general view above stated." The general view to which the court thus refers is

expressed in the earlier part of the opinion as follows: "While the exact question has never been determined in this state, in the case of a partial loss with such a contract it has been determined, in harmony with the general view, that the loss is limited by the value stated and agreed upon in the bill of lading in the case of a total loss. (*Pierce v. Southern Pacific Co., supra.*) If this limit is valid as to a total loss, there seems to be no reason why it should not also be considered as a limitation upon the damage in the case of a partial loss." It is declared further that the authorities are not in accord as to the question, but the supreme court approved the view announced in 10 Corpus Juris, section 612, and 3 Sutherland on Damages, 3391.

In the *Pierce* case, *supra*, it is to be observed that the bill of lading provided "that the actual invoice cost at point of shipment will be taken as *measure* of damages," language of somewhat different import from that to be construed herein. It was also held that it was error for the lower court to permit the market value of the trees at Riverside, the point of destination, to be shown, and that the injury should have been limited to what was the value in Florida, the shipping point. It was, therefore, in effect held that the value in Florida was not only the *measure* of the damages that could be recovered, but that it was the only *basis* upon which such damage could be computed. It may be added that obviously it would have made no difference in the result in that case whether said value was considered as the measure of the recovery or the basis upon which the damages should be computed, since there was a total loss.

In Corpus Juris, *supra*, the rule is stated as follows: "The parties may, by express provisions to that effect, stipulate that in case of partial loss, the damage shall be proportioned on the basis of the sum named as the maximum limit; but where this is not done the question becomes one of construction and very generally the view is entertained that such stipulations are to be considered as permitting recovery for the damages actually done, the amount recoverable not to exceed the amount agreed on as compensation for a total loss."

As stated in Sutherland, *supra*, "where a statute authorizes a limitation of liability by contract and a contract is made limiting liability for loss of livestock to the actual cost at point of shipment and in no event to exceed a stipulated sum

per head, the measure of damages for injuries to the animals in transit due to negligence is the amount that each has depreciated in value, but in no event to exceed the actual cost at point of shipment as shown by the market value there or the stipulated value."

An examination of the cases cited by *Corpus Juris* and *Sutherland*, *supra*, in support of the text shows that the phraseology of the respective bills of lading is somewhat different from the language involved herein, and it lends itself more easily to the construction that the invoice price was intended to be the *measure* rather than the *basis* of the amount recoverable.

It may be said, also, of the *Olcovich* case, *supra*, that it arose prior to the adoption of the uniform bill of lading in 1908. The corresponding provision, though, in the bill of lading involved in said case was: "The amount of loss or damage for which the carrier becomes liable shall be computed at the value of the property at the place and time of shipment," being substantially the same in that respect as the bill of lading herein. Said decision undoubtedly, therefore, favors the conclusion of the trial court in this case, since the damages awarded for each shipment are less than the amount of the invoice value and freight.

However, we cannot reconcile this view with the decision of the United States supreme court in the *Texas* case, in 244 U. S., *supra*.

The interpretation of the uniform bill of lading issued in accordance with the schedule of freights and fares filed with the Interstate Commerce Commission in pursuance of the act of Congress and relating to an interstate shipment, and the consideration of the liability of the shipper thereunder, involve federal questions concerning which the decisions of the federal courts are supreme. (*Southern Ry. Co. v. Prescott*, 240 U. S. 632, [60 L. Ed. 836, 36 Sup. Ct. Rep. 469]; *Georgia etc. R. R. Co. v. Blish Milling Co.*, 241 U. S. 190, [60 L. Ed. 948, 36 Sup. Ct. Rep. 541]; *Atchison etc. Ry. Co. v. Harold*, 241 U. S. 371, [60 L. Ed. 1050, 36 Sup. Ct. Rep. 665].)

In the *Prescott* case it is said: "Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier

with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the divers requirements of state legislation and decisions," citing a large number of cases.

The case of *Detroit & M. Ry. Co. v. Fletcher Paper Co.*, 248 U. S. 30, [63 L. Ed. 107, 39 Sup. Ct. Rep. 13], involves an entirely different question.

Therein the suits were brought to recover the difference between the rates fixed by the Michigan Railroad Commission on logs carried *wholly within the state* and the higher rates that the defendant actually charged. The court held that the determination of the merits of the controversy depended upon the construction of the state laws, as to which the state "has the last word." It was expressly stated that the cases did not involve interstate commerce.

We see no escape from the conclusion that under the decisions of the highest court of the land the award of the trial court was too high.

To state it sententiously: The United States supreme court holds that under this form of contract the shipper can recover only his *actual* loss instead of his full compensatory damage.

It is not necessary, though, to reverse the case, since the findings of fact are complete. The judgment is modified so as to provide that "plaintiffs do have and recover of and from the Southern Pacific Company, a corporation, the defendant, the sum of \$1,528.06, with interest thereon at the rate of seven per cent per annum, as follows: On the sum of \$394.12 from the twenty-first day of October, 1913; on the sum of \$422.22 from the twenty-third day of October, 1913; and on the sum of \$711.72 from the fourteenth day of November, 1913," and, as thus modified, the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard by the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 5, 1919.

All the Justices concurred.

[Crim. No. 838. First Appellate District, Division One.—April 9, 1919.]

THE PEOPLE, Respondent, v. MARIO BONFANTI,
Appellant.

[1] CRIMINAL LAW—ASSAULT WITH INTENT TO COMMIT RAPE—DEFECTIVE INFORMATION—INSUFFICIENT GROUND FOR REVERSAL.—In view of the mandatory direction of section 4½ of article VI of the state constitution, the omission to allege in an information charging assault with intent to commit rape that the victim of the assault was not the wife of defendant is not a sufficient defect to warrant a reversal of the judgment, where the record shows that the woman was not in fact the wife of the defendant and that the trial proceeded as if the allegation were there, and fails to show that a miscarriage of justice resulted.

APPEAL from a judgment of the Superior Court of San Mateo County. Geo. H. Buck, Judge. Affirmed.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto for Appellant.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, Franklin Swart, District Attorney, and Ray B. Lyon, Deputy District Attorney, for Respondent.

KERRIGAN, J.—The defendant was convicted of the offense of assault with intent to commit rape, and appeals from the judgment. He urges three grounds in support of his appeal, the first of which is that the information fails to state an offense within the jurisdiction of the superior court—the court in which he was tried and convicted. The defect of the information referred to is that there is no statement therein that the victim of the assault was not the wife of its perpetrator; that, accordingly, for aught that appears in the information, she may have been his wife, and consequently the alleged acts of violence constitute in law a simple assault, an offense not within the jurisdiction of the superior court.

The offense that the information purported to charge is that defined by section 220 of the Penal Code, which provides that "every person who assaults another with intent to commit rape . . . is punishable by imprisonment in the state prison

... ” Section 261 of the same code defines rape as “an act of sexual intercourse accomplished with a female not the wife of the perpetrator,” under variant conditions set forth in said section, among which is the accomplishment of the act by means of force and without the consent of the participant. It is thereupon argued that an information charging an assault with intent to commit rape must contain the same statement with reference to the woman as in a charge of rape itself, namely, that she was not the wife of the perpetrator.

The cases of *People v. Miles*, 9 Cal. App. 312, [101 Pac. 625], and *People v. Everett*, 10 Cal. App. 12, [101 Pac. 528], are cited in support of the appellant's contention. The first of these cases was upon an information charging the same offense as in the case at bar, and the second of them was upon an information charging rape, in both of which it was held that the omission to state therein that the female concerned was not the wife of the defendant rendered the information so defective as to necessitate a reversal of the judgment.

In this connection, however, it is urged by the attorney-general that the two cases cited, having been decided prior to the adoption of an amendment to the constitution known as section 41½ of article VI thereof, should no longer be regarded as controlling, a new rule having been prescribed by that amendment for the guidance of appellate courts in the decision of appeals.

The new rule of decision laid down by the constitution is couched in the following terms: “No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.”

[1] The defect in the information here pointed out is an error of pleading, and, following the mandatory direction of the constitution, the judgment should not be reversed or a new trial granted unless that error of pleading has, in the opinion of this court, formed after an examination of the entire cause, including the evidence, resulted in a miscarriage of justice. It becomes, then, pertinent to inquire how the omission to state in the information that the woman, upon

whom the defendant is charged with having committed the assault, was not his wife affected his trial, and to determine whether the omission pointed out affected it to such an extent as to have brought about a miscarriage of justice. An examination of the record immediately discloses that the omission in question affected the trial not at all; in fact, the trial proceeded as if the allegation were there. Its absence was not noticed by the defendant. He did not even demur to the indictment; if he had done which his cause of complaint would have been at once removed, but without his thereby gaining any apparent advantage. For the fact is that the woman was not his wife. Some of the instructions to the jury proposed by his own counsel stated the fact baldly that he was in fact charged with an assault to commit rape. It appeared at the trial that the victim of his assault was not in fact his wife, but was the wife of another man—his neighbor—and the mother of three children. It could not be contended, even by the defendant, that if the information had contained the statement that the victim of the assault was not his wife, the trial would have proceeded with one iota's difference from the course it took, or that the verdict of the jury or the judgment of the court would have been other than it was.

Under these circumstances, it appears to us that there could hardly be a case to which to apply more appropriately the rule of decision laid down by the constitution.

This rule since its adoption has been applied many times, and, we think, in cases where the error relied upon was of a less trivial character, regarded from the point of view of its consequences, than the one here. Thus, in *People v. Tomskey*, 20 Cal. App. 672, [130 Pac. 184], the trial was had without the defendant having entered a plea of guilty or not guilty. This must be conceded to be a very substantial departure from proper and regular procedure, but it was held not to be sufficient to require a reversal of the case where the record did not show that a miscarriage of justice had resulted. In *People v. O'Bryan*, 165 Cal. 55, [130 Pac. 1042], and *People v. Lawlor*, 21 Cal. App. 69, [131 Pac. 63], the errors upon which a reversal was sought were of improper admission of evidence, or misdirection of the jury, but it was held that the constitutional rule of decision required the affirmance of the judgment, it not appearing to the appellate court after its ex-

amination of the entire cause, including the evidence, that such errors had resulted in a miscarriage of justice.

Two other grounds for reversal are urged, namely, that the court refused to instruct the jury in certain specific terms as requested by the defendant, and that the evidence fails to show that the assault established thereby had for its object the raping of its victim. An examination of the instructions actually given to the jury discloses that they covered the law sought to be brought to its attention in those that were refused, although in different terms, and the examination of the evidence that we have made satisfies us that the jury was warranted in finding this question of intent against the defendant.

For the reasons given, the judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal May 9, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 5, 1919.

All the Justices concurred.

[Civ. No. 2700. First Appellate District, Division Two.—April 11, 1919.]

H. J. PERAZZI et al., Respondents, v. DOE ESTATE COMPANY (a Corporation), et al., Defendants; S. J. PRINGLE et al., Appellants.

- [1] **MECHANICS' LIENS — COMPLETION OF CONTRACTS — FINDING — EVIDENCE.**—Where a sublessee, purposing changes in the leased premises, employs certain persons to perform the plumbing, electrical wiring and painting, and no definite price is agreed upon nor plan adopted for the contemplated changes, but the work is laid out from day to day as it progresses, and such persons employed to do the work follow the instructions given to them from time to time by the sublessee, or his superintending contractor, as to the manner of its performance, in an action to foreclose their liens for such work, testimony of the plaintiffs that all the work which the sublessee had requested had been performed prior to his death, is

sufficient to sustain a finding that the contracts of the plaintiffs were completed on the date of such death.

- [2] **ID.—SUBSEQUENT PERFORMANCE OF WORK.**—Evidence that the employees of such plaintiffs were working on the premises at the time of the death of the sublessee, and that all the changes contemplated had not then been made, but were completed at a later date, is not, under the circumstances, necessarily inconsistent with the finding that the contracts of the plaintiffs were completed on the date of such death.
- [3] **ID.—UNSUPPORTED FINDING.**—A finding that certain work was completed on a given date is unsupported by the evidence where the only evidence offered is the testimony of one of the claimants that the work was finished on a date twenty-five days earlier.
- [4] **ID.—NOTICE OF COMPLETION — FAILURE TO FILE — PLEADING AND PROOF.**—Where notice of claim of lien is not filed within sixty days after the completion of their contract, the burden of alleging and proving the failure of the owner to file the notice of completion under the provisions of section 1187 of the Code of Civil Procedure, is upon the plaintiffs.
- [5] **ID.—ALTERATIONS BY LESSEE — KNOWLEDGE BY OWNERS — NONLIABILITY NOTICE.**—Knowledge by the owners of given premises that certain alterations and repairs are to be made by their lessee is sufficient to require such owners to file the notice prescribed by section 1192 of the Code of Civil Procedure as a condition of relieving their property from liability for the cost of the work performed at the request of the lessee, though such owners have no knowledge as to the scope of said work.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge. Reversed in part; affirmed in part.

The facts are stated in the opinion of the court.

Pringle & Robbins and Arthur H. Redington for Appellants.

H. K. Eells and Maxwell McNutt for Respondents.

HAVEN, J.—The appeal is from a decree of foreclosure of three contractors' liens against the leasehold interest of appellants in certain premises in San Francisco. The claims of lien sued upon are based upon work performed in the making of alterations and repairs to a portion of the building on said premises, occupied by one J. O. Long as a sublessee of

appellants. Mr. Long died on March 31, 1914, while said alterations and repairs were in progress. Upon his death the workmen were withdrawn and all work stopped. The lien claims here involved cover work which was all performed prior to the death of Mr. Long, at his instance and request. [1] Appellants claim that two of these liens were filed prematurely because the contracts upon which they are based had not been completed prior to such filing. The court found that each of the said contracts was completed on March 31, 1914. It is asserted that this finding is unsupported by the evidence, for the reason that the entire alterations and repairs contemplated in the arrangement between Mr. Long and said two respective claimants were not finished at that time. It appears from the evidence that Mr. Long purposed somewhat extensive alterations in the interior arrangements of a market, oyster-stand, and barber-shop which occupied the portion of the building of which he was the lessee; that preparatory to these general alterations he desired to change the location of the barber-shop and oyster-stand, and employed the plaintiffs to perform the plumbing, electrical wiring, and painting necessary for that purpose; that there was no definite price agreed upon nor plan adopted for all these preliminary changes, but that the work was laid out from day to day as it progressed, and plaintiffs followed the instructions given to them from time to time by Mr. Long, or his superintending contractor, as to the manner of its performance. Both of the plaintiffs, to whose claims the objection now under consideration is made, testified that all the work which Mr. Long had requested had been performed prior to his death. This evidence is sufficient to sustain the findings of the trial court that the contracts of these plaintiffs had been completed on March 31, 1914. [2] It further appears that the employees of both plaintiffs were working on the premises at the time of the death, and that all the changes contemplated in the preliminary work had not then been made, but were completed at a later date. In view of the nature of the arrangement between Mr. Long and plaintiffs, it cannot be said that there remained any uncompleted contract between them at the date of the former's death. The evidence last referred to is not necessarily inconsistent with full performance of whatever contracts of the character above indicated were made.

[3] The lien of Castagnino Bros. was upon a claim under a contract for painting, which the court found was fully performed on March 31, 1914. The only evidence in the record as to the time of completion of this contract is the testimony of one of the claimants that the work was finished on March 6, 1914. This finding is, therefore, not supported by the evidence. [4] The notice of lien by these claimants was filed for record on May 11, 1914, more than sixty days after the completion of their contract, as fixed by their own testimony. Respondent seeks to sustain this lien on the ground that the owners filed no notice of completion under the provisions of section 1187 of the Code of Civil Procedure, and that, therefore, the claimants had ninety days within which to file their lien. The record is entirely silent as to the filing, or want of filing, of this notice. We have held in the case of *Greely v. Noble, post*, p. 628, [181 Pac. 666], that the burden of alleging and proving the failure of the owner to file this notice is upon the plaintiffs. Having failed to so allege and prove, their lien was too late and should not have been allowed.

[5] It is further claimed that the record does not disclose when the appellants acquired knowledge of the making of the improvements from which the lien claims arose, and that they never obtained any knowledge of the scope and extent of such improvements. No evidence was introduced upon this matter. Its determination rests, therefore, upon the pleadings. The answer of appellants contains the following allegations: "Answering paragraph 11 of said first cause of action these defendants admit that the defendants S. J. Pringle and E. C. Pringle had knowledge that certain alterations and repairs were to be made in said building, but deny that said S. J. Pringle and E. C. Pringle had full knowledge of the alterations and repairs in said complaint set forth, and in this particular said defendants S. J. Pringle and E. C. Pringle allege that said J. O. Long informed them that he desired to make certain alterations and repairs and that these defendants then requested that a full plan of the repairs be submitted to them for their approval, and that said J. O. Long failed to submit said plan showing said alterations and repairs, and these defendants allege that while they knew that said J. O. Long had commenced work in said building, that they did not know just what the scope of the said work was." The knowledge admitted by the foregoing allegations was sufficient, in our

opinion, to require the filing of the notice prescribed by section 1192 of the Code of Civil Procedure as a condition of relieving appellants' property from liability for the cost of the work performed at the request of Mr. Long. Such knowledge need only be sufficient to put a prudent man on inquiry. (*Gentle v. Britton*, 158 Cal. 328, 332, [111 Pac. 9].) Where it is shown that the owners had knowledge of the improvements, the giving of the notice of nonliability under the above section becomes a matter of defense to be pleaded and proved by defendants. (*West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 277, [22 Pac. 231]; *Boscus v. Bohlig*, 173 Cal. 687, 691, [162 Pac. 100].) The appellants did not meet this burden.

The judgment is reversed in so far as it decrees a lien in favor of the plaintiffs Henry F. Castagnino and Emanuel Castagnino, as copartners doing business under the firm name and style of Castagnino Bros. In all other respects the judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 9, 1919, and the following opinion then rendered thereon:

HAVEN, J.—The appellants in this action have filed a petition for rehearing, claiming that the court has misinterpreted the contracts of the lien claimants Perazzi and Decker Electrical Construction Company, as set forth in their respective claims of lien; and, further, that, under the interpretation of the contracts adopted by the court, the lien claimants were not original contractors and, therefore, their liens, not having been filed within thirty days, were invalid. Appellants also request a modification of the former opinion as to the prorating of the costs on appeal. In this latter request the respondents have joined in a separate petition, urging, however, a different basis of division of costs.

It appears from the notices of lien filed by said Perazzi and Decker Electrical Construction Company that each of said claimants alleged a contract consisting of two items; first, the performance of certain work in changing the location of the barber-shop, for which in each case a definite contract price was agreed upon; and, secondly, for the performance of certain other work, with regard to which no definite

price was agreed upon, but each of the claimants was to be paid the reasonable value thereof. The evidence disclosed that all of the work upon the barber-shop had been performed prior to the death of Mr. Long. The remaining work under each contract was in the process of performance at the time of Mr. Long's death. It is with reference to that work that the construction of the contracts set forth in the former opinion is applicable. There was a definite contract between each of the lien claimants and Mr. Long, as alleged in their respective claims of lien and as established by their testimony. A part of each contract was for the performance of certain work at a definite price, all of which had been performed before Mr. Long's death. The extent and nature of the balance of the work under the contracts was dependent upon instructions to be given from day to day by Mr. Long or his agent. The possibility of the continuance of such instructions from that source was terminated by the death of Mr. Long. While, therefore, the lien claimants were original contractors, we are satisfied that there were no uncompleted contracts at the time of the death of Mr. Long, in the sense that the finding of the trial court of completion on March 31, 1914, was not supported by the evidence. Being original contractors, the liens which were filed fifty-five days after the date of completion were in time.

In the former opinion it is held that two of the liens involved in these consolidated cases were valid and one was invalid. It is urged by both parties to the appeal that under such circumstances the costs of the appeal should be prorated between them. This contention is well founded and is supported by precedent in similar cases.

It is, therefore, ordered that appellants' petition for a rehearing be, and the same is hereby, denied; that the opinion heretofore filed herein be, and the same is hereby, modified by adding at the close thereof the following: "And it is further ordered that appellants recover such proportion of their costs on appeal as the amount of the lien of Henry F. Castagnino and Emanuel Castagnino, as copartners doing business under the name of Castagnino Bros., bears to the total amount of the three liens involved in the appeal; and that the respondents recover such proportion of their costs on appeal as the total amount of the two liens of H. J. Perazzi

and Decker Electrical Construction Company bears to the total amount of the three liens involved in the appeal."

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 9, 1919.

All the Justices concurred.

[Civ. No. 2648. First Appellate District, Division One.—April 10, 1919.]

CLOVIS FRUIT COMPANY (a Corporation), Respondent,
v. CALIFORNIA WINE ASSOCIATION (a Corporation), Appellant.

[1] SALES—OPTION TO CANCEL CONTRACT—EXERCISE WITHIN REASONABLE TIME.—Where a contract for the purchase of grapes provides that if the tax on brandy used in fortifying wines shall be increased from a given sum per gallon, the purchaser might at its option terminate the contract by giving notice to that effect, and thereafter such tax is increased, the purchaser exercises its option to cancel the contract within a reasonable time where it gives the notice of cancellation two and one-half months before the commencement of the vintage season, or seven months after the occurrence of the event giving rise to the right of cancellation, where such delay is not for any unfair purpose and the growers have suffered no loss or prejudice because of such delay.

[2] ID.—WHEN TIME MATERIAL—OBJECT OF LAW.—Time is material in such cases so far only as, when associated with other circumstances, it may produce injury or unjust consequences.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge. Reversed.

The facts are stated in the opinion of the court.

Pillsbury, Madison & Sutro, Alfred Sutro and A. D. Plaw for Appellant.

Short & Sutherland and Carl E. Lindsay for Respondent.

KERRIGAN, J.—Plaintiff, as assignor of twenty-two claims arising under as many separate contracts made by defendant with plaintiff's assignors for the purchase of grapes, brought suit against defendant for the alleged breach of the contracts. Plaintiff had judgment for \$4,932.32, and defendant appeals.

The complaint consists of twenty-two separate causes of action. For the purposes of this appeal they may be said to be identical, as they grow out of similar action taken by defendant with regard to each of said contracts. The substance of each cause of action, of the answers thereto, and of the findings on the issues, is, it is conceded, correctly stated in defendant's opening brief, as follows: On a certain date plaintiff's respective assignor, mentioned in the particular cause of action, made an agreement with the defendant for the sale of the crops of wine grapes over a period of years at a fixed price per ton, grown on the respective vineyard of each assignor. In the vintage season of 1915, between August 15th and November 15th of that year, each respective assignor, it is alleged, raised and produced a certain tonnage of wine grapes, which he offered to deliver to defendant, but defendant refused to receive or to pay for the same. Each agreement is alleged to have been in full force and effect, and never to have been canceled, terminated, or ended. An assignment of each respective agreement to the plaintiff is alleged, and it is then alleged that plaintiff, by reason of the premises stated in each cause of action, has been damaged in a certain sum.

The answers to the causes of action may also, for the purpose of this appeal, be said to be identical. So far as material here, the issues raised by the answer may be stated as follows: Defendant denied that any assignor offered to deliver any of the 1915 grapes to it or that, in violation of the agreement, it refused to receive or pay for the grapes. It also denied that the agreement was in full force and effect or that it had not been canceled or terminated or ended.

As a further and separate defense it averred that in each contract sued on it is provided that, should the United States laws be so modified that the tax on brandy used in fortifying wine should be greater than six cents per proof gallon then the defendant might, at its option, cancel the contract by giving written notice of such cancellation to each respective assignor of plaintiff; that by the terms of the act of Congress of Octo-

ber 22, 1914, the United States laws were so modified that the tax on brandy used in fortifying was increased from six cents per proof gallon to fifty-five cents per proof gallon, and that on or about April 21, 1915, the commissioner of internal revenue of the United States ruled that on and after January 1, 1916, the tax on brandy used in fortifying would be increased to \$1.10 per proof gallon, and that thereupon, and prior to the alleged tender of any grapes by each respective assignor of the plaintiff to the defendant, and prior to knowledge by the defendant of any assignment of the contract to plaintiff, defendant canceled or terminated the contract of each assignor by giving each assignor written notice of cancellation, and that each assignor accepted the notice and thereafter treated the contract as canceled or terminated and of no force or effect.

The trial was by the court, without a jury. The court found for the plaintiff and made findings in accordance with the allegations of the complaint; it also found the averments of the separate and special defense of the answer to be true, except that it found that the defendant did not give notice of cancellation of the contracts within a reasonable time after the act of October 22, 1914, was passed, and that the contracts were therefore not canceled but were in full force and effect.

At the trial plaintiff offered no evidence to sustain its allegation of a tender and offer of performance, taking the position that such evidence was unnecessary because of the fact that it appears from the matter set forth in defendant's further and separate defense that such an offer would have been futile. Against the objection of the defendant the court accepted this view, and at the conclusion of plaintiff's case denied defendant's motion for nonsuit. Thereupon in support of the allegations of its separate defense the defendant introduced evidence, from which it appeared that the plaintiff's various assignors had been given written notice, under date of June 1, 1915, of the cancellation of the contract.

It is conceded that an averment of performance will not be supported by proof of a legal excuse for nonperformance. (*Estate of Warner*, 158 Cal. 441, 445, [111 Pac. 352].) It is also conceded to be a general rule of pleading that a defendant may plead inconsistent defenses, and that where there are several answers, an admission made in one is not available to destroy the efficacy of the averments or denials of the

others. (*Miles v. Woodward*, 115 Cal. 308, [46 Pac. 1076].) These fundamental rules of pleading were ignored in the trial of this case, but the consequence of the failure to observe them, and several minor questions involving the correctness of rulings upon matters of evidence, need not be here considered in view of the conclusion we have reached on a question which goes to the merits of the case.

[1] The principal question raised by the appeal is whether or not the defendant within a reasonable time exercised its option to cancel the contracts after the occurrence of the event giving it the right to do so.

On this phase of the case the evidence is without conflict. Summarized, it shows that each of the contracts in question provided that if the tax on brandy used in fortifying wines should be increased from six cents a gallon, the defendant might at its option terminate the contract by giving notice to that effect; that by an act of Congress of October 22, 1914, the tax on such brandy was increased from six to fifty-five cents per proof gallon; that on June 1, 1915, defendant gave written notice of cancellation of the contract. The contracts called for deliveries of grapes for the years from 1913 to 1917. It was agreed that the vintage season each year is from August 15th to November 15th, from which it is evident that no delivery of grapes could be made before the first mentioned date.

What is a reasonable time in any case depends upon the circumstances of the particular case. (*Smith v. Pelton Water Wheel Co.*, 151 Cal. 394, [90 Pac. 934]; *Salmon Box Co. v. Helena Box Co.*, 147 Fed. 408, [77 C. C. A. 586].) In the case of *Colfax County v. Butler County*, 83 Neb. 803, [120 N. W. 444], it is held that a reasonable time, when no time is specified, is a question of law, and depends upon the subject matter and the situation of the parties.

[2] Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injury or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong; and the main question in each case should be, Is there any just cause, because of delay, to object to the cancellation? (*Hogan v. Tucker*, 116 Ky. 918, [77 S. W. 197, 199].) Here, while the notice of cancellation was given about seven months after the occurrence of the event giving rise to the right of

cancellation, it was yet two and one-half months before the commencement of the vintage or crushing season and about five months before its close; and there is no evidence in the record to show that any of plaintiff's assignors were prejudiced because the notice was not sooner given. No witness testified that had earlier notice been given the assignors of plaintiff could have disposed of their grapes to better advantage than they actually did. Uncontradicted evidence introduced by the defendant was to the effect that according to the custom in Fresno County (the place in which these contracts were to be executed) contracts for the sale of grapes are made each year during the vintage season; and, indeed, the first witness called by the plaintiff, one of its assignors, testified that he made no attempt to sell his 1915 crop of grapes until September of that year. For aught that appears in the record the defendant may have had a very good reason for not sooner giving the notice of cancellation, which reason may have related to the mutual interest of the parties. It certainly does not appear that the delay was for any unfair purpose. But however that may be, plaintiff cannot base its claim that the notice was not timely upon a mere surmise or some possibility which has no foundation in fact. To substantiate its position that the notices were not seasonably given, plaintiff must base the same upon some competent evidence showing the assignors of plaintiff to have been injured or to have suffered loss or prejudice. This the plaintiff has not done, and the finding of the trial court that the notice of cancellation was not given within a reasonable time is not sustained by the evidence.

The judgment is reversed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 9, 1919.

All the Justices concurred.

[Civ. No. 2769. First Appellate District, Division Two.—April 11, 1919.]

M. A. GREELY, Appellant, v. GERALD E. NOBLE,
Respondent.

- [1] **PLEADING—WAIVER OR ESTOPPEL AS TO DEFENSE.**—If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance.
- [2] **MECHANICS' LIENS — NOTICE OF COMPLETION — DELAYED FILING OF CLAIM—DEFENSE—ESTOPPEL—PLEADING—PROOF.**—Where, in an action to foreclose a mechanic's lien, notice of claim of which was filed more than sixty but less than ninety days after the completion of the work, the plaintiff relies upon the failure of the defendant to file the notice of completion provided for in section 1187 of the Code of Civil Procedure, he must plead and prove the facts constituting such estoppel.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John T. Nourse, Judge. Affirmed.

The facts are stated in the opinion of the court.

Samuel Knight and F. E. Boland for Appellant.

Frank W. Sawyer for Respondent.

HAVEN, J.—Plaintiff appeals upon the judgment-roll alone in an action to foreclose an original contractor's lien for street improvements, claimed by plaintiff under the provisions of section 1191 of the Code of Civil Procedure. The plaintiff alleged, and the court found, that the work upon which the lien was based was fully completed and performed on June 4, 1917; and that plaintiff's claim of lien was filed in the office of the county recorder on August 6, 1917, more than sixty days after the completion of the work. From these facts the court reached the conclusion of law that the claim of lien was not filed within the time required by section 1187 of the Code of Civil Procedure and was, therefore, invalid. There is neither allegation in the complaint nor finding as to the filing,

or want of filing, by the owner of the notice of completion provided for in said section.

The appeal presents the single question as to whether or not it is incumbent upon the plaintiff, in order to obtain the benefit of the ninety-day period for filing liens specified in the closing sentence of section 1187 of the Code of Civil Procedure, to allege and prove that the owner did not file the notice of completion therein provided for. Counsel for appellant state that this question has never been considered by the appellate courts of this state, and we have found no case in which the exact question is involved. In *Meyer v. City Street Improvement Co.*, 164 Cal. 645, [130 Pac. 215], it was held that a claim of lien for street work under section 1191 of the Code of Civil Procedure was in time if filed within ninety days after the completion of the work. That decision is based upon an interpretation of the mechanic's lien law as it existed prior to the amendments of 1911, and expressly states that it does not determine the effect of the revised act. The present provisions of section 1187 apply to liens claimed under any section of the chapter on mechanics' liens. (*Boscut v. Waldmann*, 31 Cal. App. 245, 254, [160 Pac. 180].)

In order to maintain an action for the foreclosure of a lien under section 1187 of the Code of Civil Procedure, it was necessary for plaintiff to allege that his claim of lien was filed within the time therein specified. That time is limited to a period of sixty days after the completion of the work, with the proviso that, if the owner fails to file the notice of completion therein provided for, he "shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter; provided, that all claims of lien must be filed within ninety days after the completion of any building, improvement or structure, or the alteration, addition or repair thereto." This is a statutory declaration of an estoppel against the owner, based on his failure to file the notice referred to. [1] It is settled law in this state that: "If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance." (*Goorberg v. Western Assur. Co.*, 150 Cal. 510, 519, [119 Am. St. Rep.

246, 11 Ann. Cas. 801, 10 L. R. A. (N. S.) 876, 89 Pac. 130, 133]; *Newhall v. Hatch*, 134 Cal. 269, 273, [55 L. R. A. 673, 66 Pac. 266].)

[2] The complaint alleges facts which show that plaintiff has no cause of action under the sixty-day limitation contained in the first part of section 1187 of the Code of Civil Procedure; and fails to plead any facts showing that the ninety-day limitation is applicable to his case. In other words, plaintiff pleads himself without the terms of one portion of the section, and does not plead himself within the other portion thereof. The sixty-day limitation is a defense which is available to the defendant, unless he is estopped from relying upon it by reason of his failure to file the notice of completion. In order to prove the filing of his lien within the statutory period, plaintiff must rely upon this estoppel. If he so relies, he must plead and prove the facts constituting such estoppel. Having failed to do so, the trial court was correct in holding that his lien was too late, and for that reason invalid.

The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

[Civ. No. 2504. First Appellate District, Division One.—April 11, 1919.]

In the Matter of the Accusation of BAR ASSOCIATION
OF SAN FRANCISCO v. CLIFFORD McCLELLAN.

- [1] ATTORNEY AND CLIENT—COLLECTION OF MONEY DUE CLIENT—DUTY OF ATTORNEY.—It is the plain duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to promptly pay over the same upon the settlement of his fee, and in no case is he warranted in falsely stating that the money has not been received.
- [2] ATTORNEY AT LAW—UNPROFESSIONAL CONDUCT—DISBARMENT.—In this disbarment proceeding the conduct of the accused, although it amounted to a gross neglect to fulfill his obligation to his client, and constituted unprofessional conduct, was not such as to call for disbarment.

PROCEEDING to disbar an attorney at law. Accusation dismissed.

The facts are stated in the opinion of the court.

Frank S. Brittain, Nathan Moran and Bert Schlesinger for Petitioner.

Edward Lande for Respondent.

THE COURT.—This is a proceeding instituted by the Bar Association of San Francisco for the disbarment of Clifford McClellan, an attorney and counselor at law.

The accusation contains three separate charges:

(1) That the accused misappropriated funds belonging to his client in the course of professional employment.

(2) Willful concealment and denial on his part of the moneys collected.

(3) The making of a false and fraudulent claim to a portion of the money received.

The accused denied all the charges.

The evidence presented upon the first and third counts of the accusation is voluminous. Under it a conflict exists which should be resolved in favor of the accused. No useful purpose, therefore, would be subserved by narrating or closely analyzing it.

In support of the second count, however, and the one mainly relied upon for the penalty sought to be imposed, the evidence shows that the accused was employed by one Elizabeth Douglas, a widow, to collect the proceeds of an insurance policy on the life of her deceased husband. Payment of the policy was at first refused by the insurance company, but finally the accused received a check in settlement of the claim for the sum of \$1,189.75. The check was received by him on November 20, 1917, and he deposited the same in his personal bank account, but failed to advise his client that he had received payment until some two months later, when demand was made upon him for a settlement after his client had received information that the claim had been paid. The demand was made by attorneys employed by Mrs. Douglas, and a settlement was had between them and the accused, whereupon the amount agreed upon was paid, which amount, Mrs. Douglas testified, was satisfactory to her.

Accused does not deny that he failed to advise his client of the receipt of the money, but he seeks to justify his tardiness in turning over the amount on the ground that his accounts with her were confused, and that he was ignorant of the exact amount to which he was entitled, and that the stress of business prevented him from informing himself upon the subject. There is also testimony to the effect that the accused informed his client that he had not collected the money at a time when it was in his possession. This the accused denies. It is true that the accused was entitled to a portion of the fund collected as compensation for his services, the amount of which had not been definitely fixed and determined. While the retention of this portion was justified, it did not free him from his duty of advising his client that the collection had been made. [1] It is the plain duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to promptly pay over the same upon the settlement of his fee, and under no circumstances is he warranted in falsely stating that the money has not been received.

[2] The conduct of the accused is blameworthy for its laxity in this particular; yet we do not feel from a careful review of the evidence that it calls for the drastic measure of disbarment. His delay, however, as shown by the evidence, was a gross neglect to fulfill his obligation, and constituted unprofessional conduct, which calls for the censure of this court. It is to be hoped that the bringing of these proceedings by the Bar Association of San Francisco, prompted by a high sense of duty, may prove a warning to the accused, and cause him to so acquit himself in the future as to avoid the slightest appearance of infidelity to professional duty.

The accusation is dismissed.

[Civ. No. 2615. Second Appellate District, Division One.—April 11, 1919.]

VINTON E. DURAN, Respondent, v. YELLOW ASTER MINING AND MILLING COMPANY (a Corporation), Appellant.

- [1] **NEGLIGENCE—ACTION FOR DAMAGES FOR PERSONAL INJURIES—BREAKING OF ROPE—WANT OF SATISFACTORY EXPLANATION—INFERENCE—FINDING.**—In an action for damages for personal injuries suffered by plaintiff through the breaking of a rope which was being used by defendant's employees, including plaintiff, in putting back and placing a dump-car upon the track off which it had rolled, if the evidence produced by the plaintiff showing his injury by reason of the breaking of the rope is such as to raise an inference of negligence, in the absence of a satisfactory explanation of the circumstances on the part of the defendant, it cannot reasonably complain against the finding of such negligence.
- [2] **ID.—CAUSE OF INJURY—CONTROL OF DEFENDANT—EVIDENCE OF WANT OF CARE.**—When a thing which causes injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.
- [3] **ID.—SPONTANEOUS EXCLAMATIONS—ADMISSIBILITY AS EVIDENCE.**—In an action for damages for personal injuries, evidence of a spontaneous declaration uttered by the plaintiff at the time of the injury is admissible.
- [4] **ID.—MEASURE OF DAMAGES—INSTRUCTIONS.**—In an action for damages for personal injuries, it is not error to instruct the jury that "if from the evidence in this case, the jury should find that the plaintiff has sustained damages as alleged in his complaint, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have testified or expressed an opinion as to the amount of such damages, but the jury may make such estimate from the evidence in the case and by considering them in connection with their own knowledge and experience in the affairs of life," where in other instructions the jury is plainly told that if they find for the plaintiff they should award to him only such actual damages as the evidence showed that he had sustained . . . , "taking into consideration his loss of earnings (if any), necessary expenses in medical and surgical aid, so far as the same appear in evidence in this case (if any)."

[5] **ID.—AMOUNT OF DAMAGES AWARDED—EVIDENCE.**—In this action for damages for personal injuries, in view of the fact that the plaintiff was compelled to undergo much suffering and there was evidence tending to show permanent disability affecting two fingers of his right hand, and other disabilities still continuing at the time of the trial, which was nearly two years after the date of the accident, there was no such discrepancy between the evidence and the amount of the damages awarded as to raise an inference that the verdict must have been influenced by passion or prejudice on the part of the jury.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. Curtis D. Wilbur, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

Ward Chapman for Appellant.

Frank P. Doherty and B. Rey Schauer for Respondent.

CONREY, P. J.—The defendant appeals from a judgment in the sum of four thousand dollars and from an order denying its motion for a new trial. The case was tried by jury. The action was brought to recover damages for personal injuries suffered by the plaintiff while in the employ of the defendant. It was alleged that the accident and injury were caused by negligence of the defendant, which negligence consisted in the selection and use of a rope which was insufficient in size, weight, and strength to sustain and hold the weight of a dump-car which had rolled off the track and down the side of the dump, and the accident occurred while defendant's employees, including the plaintiff, were engaged in putting back and placing the car upon the track.

Appellant's principal contention is that the evidence is not sufficient to justify the implied finding of negligence. Counsel for appellant claims that, aside from the fact that the rope broke, the plaintiff offered no evidence whatever of any lack of care on defendant's part in the selection of the rope or in the manner of fastening it, or in any act committed or omitted, unless possibly certain testimony that an engine was permitted to run over the rope where it was tied on the track before the accident was intended to give rise to an inference of negligence.

The evidence is undisputed that a new rope of the size and quality used is good for four thousand pounds dead weight on a vertical lift, and if it is a slightly used rope, one-third should be deducted. The rope in question had been used. There is no evidence referring to the tensile strength of such a rope when resisting a sudden jerk or shock; so far as the evidence shows, it may be that such a rope would have broken under a sudden strain produced by an object weighing much less than two-thirds of four thousand pounds. It was stipulated that the weight of the truck and running gear of the car was one thousand six hundred pounds; that the weight of the bed independent of the running gear and truck was about one thousand two hundred pounds, making a total weight of two thousand eight hundred pounds; and appellant claims that the rope was attached to the truck and running gear at the time of the accident and that the bed of the car was lying apart from the truck and running gear. [1] If the evidence produced by the plaintiff showing his injury by reason of the breaking of the rope was such as to raise an inference of negligence, then, in the absence of a satisfactory explanation of the circumstances on the part of the defendant, it cannot reasonably complain against the finding of such negligence. There being no evidence necessarily proving that the rope was reasonably sufficient to resist a sudden strain caused by an object weighing one thousand six hundred pounds, we cannot say that the jury's conclusion upon the matter of insufficiency of the rope was not sustained by the evidence. Defendant's superintendent, C. H. Frye, was present at the time and place of the accident. He testified as a witness on behalf of the defendant. According to his testimony, there was nobody pulling on the rope; it was simply there as a guide to hold the car while the men were working, and when they lifted the lower side up the car came down a little bit and snapped the rope. "As soon as the car was lifted out of the muck on the side that Mr. Duran was working on, you see, it pulled the rope taut and it snapped."

There does not appear to have been any close inspection of the rope before it was used. Mr. Frye says: "I did not examine the rope myself to see if it was in good condition; if the rope looks all right nobody pays any attention to it." At the commencement of the work one end of the rope was tied to the car and the other end was tied around the two

tracks on the grade above. Afterward and before the moment of the accident an engine had run over the rope and cut it in one place. Where the rope ran over the other rail of the track the rope was not cut, and there is no evidence showing the extent to which the rope may have been mashed and weakened in any part except where it was cut. It does not appear that any inspection was made by the defendant for the purpose of determining that fact. That part of the rope which had been cut was taken out and was not in use at the moment of the accident. So far as the evidence shows, that part of the rope which was not cut, but which had been run over by the engine, may have been in use at the moment of the accident and may have been the part of the rope which yielded under the strain and caused the accident. Under the evidence the jury would have been justified in determining that this was the fact.

[2] In connection with his claim that the evidence does not show any fact or circumstance from which negligence on defendant's part can be deduced, counsel for appellant endeavors to apply the rule that no inference of negligence can be implied from the mere fact that the injury occurs. Such cases as *Madden v. Occidental Steamship Co.*, 86 Cal. 445, [25 Pac. 5], and *Sappenfield v. Main Street R. R. Co.*, 91 Cal. 48, [27 Pac. 590], are cited as sustaining this rule. Those decisions and others are cited and discussed in *O'Connor v. Mennie*, 169 Cal. 217, [146 Pac. 674]. The rule is affirmed that when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from a want of care. It is proper to say here, as was said in that case, that in order to make a sufficient case for the jury it was not incumbent on the plaintiff, under the circumstances appearing, to do anything further than he did do in the way of showing that the defect in the appliance was actually known to the defendant, or would have been discovered upon the exercise of reasonable care to ascertain its condition. We think that the evidence is sufficient to sustain the finding of negligence.

There are two exceptions to rulings of the court on the admission of testimony. The first exception is based upon

the claim that certain redirect examination of the plaintiff which was allowed by the court was indulged for the purpose of conveying to the jury the information that the defendant was a rich corporation. Without setting forth this evidence, it is enough to say that it had another and unquestionably legitimate purpose, to which such evidence was pertinent. The exception is not sustained. [3] The second exception relates to a question asked of plaintiff's witness Kelly as to whether or not he, at a time after the accident when plaintiff was seeking to use a rake, heard plaintiff utter any exclamation. Defendant objected to this upon the ground that it called for a self-serving, hearsay declaration, and was incompetent, but the court overruled the objection on the theory that the plaintiff was calling for a spontaneous exclamation, and the witness answered that the exclamation was, "My God, it hurts." There was no error in overruling this objection. (*Dow v. City of Oroville*, 22 Cal. App. 215, 226, [134 Pac. 197].)

[4] It is claimed that the court erred in its instructions on the measure of damages. The particular instruction selected by appellant for criticism is the following: "If, from the evidence in this case, the jury should find that the plaintiff has sustained damages as alleged in his complaint, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have testified or expressed an opinion as to the amount of such damages, but the jury may make such estimate from the evidence in the case and by considering them in connection with their own knowledge and experience in the affairs of life." Counsel say that this is a true rule in so far as the award had reference to the element of suffering or impairment of health, but is wholly incorrect in so far as loss of earnings or medical expense is concerned. The decision in *Rouse v. Pacific Electric Ry. Co.*, 27 Cal. App. 772, [151 Pac. 164], relied upon by appellant here, is not in point. The instruction discussed in that case referred particularly to the plaintiff's loss of earning power and told the jury that "it is not necessary that evidence should be presented in this matter." It was held that in giving such instruction the court erred; but no corresponding statement or inference is contained in the instruction presented for consideration here. Moreover, in other instructions given, the jury were plainly told that if

they found for the plaintiff, they should award to him only such actual damages as the evidence showed that he had sustained, etc., "taking into consideration his loss of earnings (if any), necessary expenses in medical and surgical aid, so far as the same appear in evidence in this case (if any)."

[5] Finally, appellant claims that the amount awarded as damages was grossly excessive. The plaintiff was compelled to undergo much suffering and there is evidence tending to show permanent disability affecting two fingers of his right hand, and other disabilities still continuing at the time of the trial, which was nearly two years after the date of the accident. There is no such discrepancy between the evidence and the amount of damages awarded as to raise an inference that the verdict must have been influenced by passion or prejudice on the part of the jury. (*Perry v. Angelus Hospital Assn.*, 172 Cal. 311, [156 Pac. 449].)

The judgment and order are affirmed.

Shaw, J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 9, 1919.

All the Justices concurred.

[Civ. No. 2670. First Appellate District, Division One.—April 12, 1919.]

EMMA R. BRADLEY, Respondent, v. RICHARD BRADLEY, Appellant.

[1] **DIVORCE—FINAL DECREE—MOTION TO MODIFY—MATTERS REVIEWABLE.**

Upon a motion to modify a final decree of divorce in which the property rights of the parties and the alimony were left subject to future modification, it is only such facts as have arisen or become known to the party since its entry that may be made the basis of an attack upon its provisions. As to all other matters, it is as final as any other judgment or decree after the period for appeal has expired.

[2] **ID.—APPEAL—EXTRINSIC FACTS—RELIEF ALLOWABLE.**—Upon an appeal from an order modifying a final decree of divorce in which

the property rights of the parties and the alimony were left subject to future modification, the appellant is not entitled to any relief from the appellate court because of the fact that since the entry of the modifying order appealed from that court had occasion to pass upon the merits of certain other appeals involving the property rights and interests of the parties.

APPEAL from an order of the Superior Court of the City and County of San Francisco modifying a final decree of divorce. J. J. Trabucco, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Richard Bradley, *in pro. per.*, for Appellant.

Charles Baer for Respondent.

RICHARDS, J.—This appeal is from an order modifying a final decree of divorce between the parties hereto in so far as the provisions of said decree undertook to provide for the future maintenance of the plaintiff and respondent upon this appeal.

By the terms of the original final decree the plaintiff was granted a divorce from the defendant upon the ground of cruelty, and the defendant was directed to pay to the plaintiff the sum of one hundred dollars per month so long as she remained unmarried, and was further directed to give reasonable security for the payment of said sum. The decree recited that the defendant had, by virtue of the interlocutory decree, furnished a bond in the sum of four thousand dollars as and for such security, and said bond was by the final decree to remain in full force and effect. This decree was entered on October 7, 1915. On November 24, 1916, the defendant moved the court for an order modifying said final decree by the elimination therefrom of its provision respecting the plaintiff's further maintenance and support. Upon the hearing on said motion affidavits and counter-affidavits and also oral testimony *pro* and *con* were presented by the respective parties, going with much detail into the past and existing financial relations and abilities of the respective parties. These, it is almost needless to say, were strongly and decidedly in conflict as to almost every matter which was asserted or disputed therein. The trial court, having considered these, concluded to modify its former final decree by reducing the

former amount of one hundred dollars to the sum of \$85, to be paid monthly to plaintiff by the defendant. It is from the order making this modification that the defendant has prosecuted this appeal.

[1] In his briefs upon appeal, which the defendant has presented *in propria personae*, he attempts to discuss many matters which were the subject of controversy upon the main trial of the cause and which were concluded by the findings and decrees of the court therein, from which no appeal was taken. The appellant seeks to justify his attempt to reopen these matters by the claim that the terms of the final decree as to the property rights of the parties and as to alimony being subject to future modification, these matters therein treated may always be relitigated. But this is not the rule, since upon a motion to modify a final decree of divorce in these respects which has not been appealed from it is only such facts as have arisen or become known to the party since its entry which may be made the basis of an attack upon its provisions. As to all other matters it is as final as any other final judgment or decree after the period for appeal has expired. In so far as the appellant's briefs have relation to facts arising since the entry of said final decree tending to show a change of condition in the defendant's financial ability to make the required payments, the evidence adduced upon the motion for a modification of the decree was, as we have seen, in sharp conflict. The court had the parties before it, and not only read their conflicting affidavits, but both heard and saw their examination, and having done so saw fit to make the modification in the decree which, in so far as it went, was in the defendant's favor. We are unable to say from the state of the record before us that the court in any way abused its discretion in the form or substance of the modifying order.

[2] The appellant finally contends that he is entitled to some measure of relief from the court for the reason that since the entry of the modifying order herein appealed from the court has had occasion to pass upon the merits of certain other appeals between the parties hereto involving certain aspects of their property rights and interests, and that this court should now take those matters into consideration in passing upon this appeal, but it is apparent that this cannot

be done, since the matters concluded by those appeals were not before the trial court at the time its modifying order herein appealed from was made. This is not, therefore, the forum wherein the appellant may obtain relief depending upon any conclusions arrived at in those cases, for any advantage which he might derive therefrom could only be gained through a renewal of his effort to have said final decree modified in the trial court based upon such change in conditions as may have arisen or been established since the making of the present modification of said original decree. Order affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 9, 1919.

All the Justices concurred.

[Civ. No. 2401. Second Appellate District, Division One.—April 12, 1919.]

W. W. ADAMS, Appellant, v. THEO. H. PLETSCH et al.,
Respondents.

- [1] ACTION FOR MONEYS DUE—FINDINGS—EVIDENCE.—In this action to recover commissions alleged to be due plaintiff in connection with the sale of stock of a certain corporation, also to recover a further sum claimed to be due plaintiff in connection with certain collections alleged to have been made, the findings of the trial court in favor of the defendants were supported by the testimony of the defendants.
- [2] ID.—CONTRADICTIONARY EVIDENCE—PROVINCE OF TRIAL COURT.—Where the testimony of the two defendants was contradictory, it was for the trial court to weigh and reconcile such inconsistencies by accepting, in whole or in part, the testimony of either defendant.
- [3] ID.—FRAUD—PLEADING—EVIDENCE.—Where a party is induced through fraud to enter into an agreement waiving his claim and right to money which might in a certain contingency become due to

him, in an action to recover such money after the happening of the contingency, evidence of the facts constituting the fraud is admissible only if such facts are pleaded.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge. Affirmed.

The facts are stated in the opinion of the court.

Tipton & Cailor for Appellant.

Head & Marks and Elmer I. Moody for Respondents.

SHAW, J.—Plaintiff appeals from a judgment entered in favor of defendants, who were promoters of a corporation designated as the Continental Mausoleum Company and who, as agents for the sale of the capital stock of the corporation, were to receive a commission of twenty per cent upon sales made by them. In furtherance of the business for which it was created, the corporation had made a contract whereby it agreed to purchase from William N. Holway the rights to a certain United States patent for the sum of sixty-five thousand dollars. It appears that defendant Pletsch had a contract with Holway for the collection of this money. The defendants, thus representing both Holway and the corporation, agreed to pay plaintiff ten per cent commission on all stock which he might buy, and a like sum on all sales of stock in the negotiation of which he assisted, and further agreed that he should be paid ten per cent commission on all sums of money collected by Pletsch on the Holway contract. One count of the complaint alleged that, pursuant to this agreement, plaintiff bought stock of the corporation of the value of three thousand five hundred dollars, upon which he was entitled to a commission of seven hundred dollars, and that collections of seven thousand dollars were made upon the Holway contract, upon which he was entitled to a like sum of seven hundred dollars, for the total of which judgment was asked.

The court, in effect, found that as to the stock bought by plaintiff, thirty thousand shares thereof, valued at three thousand dollars, was not subject to the agreement because the same was made after the purchase; that as to the other five hundred dollars worth of stock purchased by plaintiff, he received payment of his commission thereon, which fact

plaintiff in his testimony admitted to be true. It was further, in effect, found that no collections upon which plaintiff was entitled to commissions had been made on the Holway contract.

[1] - The chief ground upon which appellant insists on a reversal is that the evidence is insufficient to support these findings. It would be an idle waste of time for the court to make an extended review of the testimony offered touching the issues so joined. Suffice it to say that counsel for appellant concede the testimony of defendants supports the findings. [2] Their contention is that it is contradictory. Concede so much, nevertheless it was for the trial court to weigh and reconcile such inconsistencies by accepting, in whole or in part, the testimony of either defendant. Both defendants are positive in their statements that at the time plaintiff bought the thirty thousand shares of stock there had been no talk or conversation whatever in reference to allowing him any commission whatsoever thereon. They insist that the only agreement regarding commissions on stock bought by plaintiff was made after said purchase by him of the thirty thousand shares.

Appellant's attack upon the finding to the effect that defendants promised to pay him the sum of ten per cent on all sums of money in cash collected from the Mausoleum Company by Holway is based upon the claim that there was transferred to Holway by the company certain contracts and property of the value of seven thousand dollars. The agreement, however, as shown by the testimony of defendants, was that the ten per cent commission was to be paid only upon sums of money which Holway received, and not upon property which he might agree to accept in lieu of cash. It further shows that defendants consulted plaintiff with reference to the company transferring this property to Holway, at which time he was told that if Holway accepted the property for the agreed sum of seven thousand dollars, no commission would be allowed thereon, to all of which plaintiff himself admits that he agreed. Moreover, since Holway testified that upon said contract the company "never paid any money, property, or consideration whatever," it appears that such transfer was never consummated.

[3] While plaintiff admits that he agreed, in case of a transfer of the property to Holway, he would waive any right

or claim to commissions upon the value of the property, he insists that he was induced so to do by defendants agreeing to a like waiver on their part, instead of which, however, he claims that defendants obtained the entire property and appropriated it to their own use and benefit, by reason of which fact the agreement of waiver on his part was procured by fraud. The court, however, refused to receive and consider testimony tending to establish such alleged fraudulent acts and representations on the part of defendants, for the reason that the complaint contained no allegation of fraud. The action as brought was for money had and received by defendants to plaintiff's use and benefit, upon which appellant insists, on the authority of *Minor v. Baldridge*, 123 Cal. 187, [55 Pac. 783], that evidence showing fraud in procuring the agreement of waiver made by plaintiff was admissible. In the case cited it was held that where a condition precedent to the payment of money was falsely represented to have been performed, such fact might be shown in an action in *assumpsit*. The case is not applicable to the facts under consideration, for the reason that here plaintiff entered into an agreement surrendering his claim and right to money which might in a certain contingency become due to him. No money had, as in the *Minor* case, been paid, and if the contingency arose under which plaintiff, except for his agreement of waiver so claimed to have been procured by fraud, was entitled to commissions, the facts showing that it was so obtained should have been alleged. Otherwise defendants would not have notice of the nature of plaintiff's claim based on his repudiation of the contract of waiver. (*Nichols v. Randall*, 136 Cal. 426, [69 Pac. 26].) However, even were the alleged error conceded, plaintiff was not prejudiced thereby, for the reason that it appears without contradiction that the property was not transferred to Holway, nor were any collections made upon his contract with the company.

Judgment affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1921. Third Appellate District.—April 14, 1919.]

ELIZABETH A. STOCK, Respondent, v. O. F. SITES,
Appellant.

[1] **STREET LAW — VROOMAN ACT — CAREFUL ESTIMATES OF COSTS AND EXPENSES—FURNISHING BY CITY ENGINEER—COMPLIANCE WITH ACT —PLEADING.**—In an action to quiet title against a lien arising out of the issuance of a bond for street improvements, an allegation in the answer "that before the passing of the resolution . . . careful estimates of the costs and expenses thereof had been required by it to be furnished to said common council by the city engineer of said city," in the absence of special demurrer, shows a sufficient compliance with section 3 of the Vrooman Act, which provides that "before passing any resolution for the construction of said improvements, plans and specifications, and careful estimates of the cost and expenses thereof *shall be furnished* to said city council if *required* by it, by the city engineer of said city."

[2] **ID.—STATEMENT OF ESTIMATES—WHAT CONSTITUTES.**—A furnishing by the city engineer of specifications or a specification of "a careful estimate" is in substance and effect the furnishing by him of a statement of the estimates.

APPEAL from a judgment of the Superior Court of Santa Clara County. W. A. Beasley, Judge. Reversed.

The facts are stated in the opinion of the court.

Hoefler, Cook & Snyder, L. M. Hoefler and George F. Snyder for Appellant.

Beggs & McComish for Respondent.

BUCK, P. J., *pro tem.*—This is an action to quiet title against a lien arising out of the issuance of a bond for street improvements on plaintiff's lot in the city of San Jose. Plaintiff had judgment, from which defendant appeals.

Appellant's contention in this case that the street in question had not been previously accepted has been sustained by the supreme court in the case of *Ransome-Crummey Co. v. Bennett*, 177 Cal. 560, [171 Pac. 304].

Also respondent's contention that the Bond Act under which the bond in question was issued does not apply to San

Jose has been recently disposed of in appellant's favor by this court in the case of *Ahlman v. Barber Asphalt Paving Co. et al.*, *ante*, p. 395, [181 Pac. 238].

[1] Further, for the purpose of sustaining the judgment, respondent in this court contends for the first time that from a certain paragraph in defendant's answer and the finding made thereon it appears "that there was no authority in law to issue" the bonds in question. Respondent quotes as follows from the answer and finding: "That before the passing of the resolution . . . careful estimates of the costs and expenses thereof had been required by it to be furnished to said common council by the city engineer of said city."

Relying upon this, respondent claims that the bond issue is defective because it does not appear from defendant's answer and finding herein that there was a compliance with section 3 of the Vrooman Act, which provides that "before passing any resolution for the construction of said improvements, plans and specifications, and careful estimates of the cost and expenses thereof *shall be furnished* to said city council *if required* by it, by the city engineer of said city."

Respondent filed no demurrer, either special or general, attacking the foregoing allegation and the finding was made accordingly. But it should be noted that the allegation and finding contained also the following language immediately following the language quoted and relied upon by counsel: "We believe that this language, in the absence of any special demurrer, possesses sufficient scope and pregnancy to supply the defect indicated by counsel. The language being as follows: " . . . and *special specifications therefor* had been furnished by him and had been filed in the office of the said city clerk on the eighth day of April, 1912." The words "special specifications *therefor*" can be deemed to refer to and embrace the "careful estimates of the costs and expenses."

[2] And certainly a furnishing by the city engineer of specifications or a specification of "a careful estimate" is in substance and effect the furnishing by him of a statement of the estimates. The Century Dictionary gives as one of the meanings of "Specification: An act of specifying, or making a detailed statement, or the statement so made; a definite or formal mention of price; as, a specification of one's requirements, for example. 'all who had relatives or friends in this predicament were required to furnish a specification of them':

Prescott, Ferd. & Isa., 1, 7." And for an example of the scope of the word "therefor," see *Hutchinson v. City of Olympia*, 2 Wash. Tr. 314, [5 Pac. 606, 607]; *Marcus v. Rovinsky*, 95 Me. 106, [49 Atl. 420, 421].

Also, the form of expression used by the pleader to convey the above idea of compliance with the statute has received a certain countenance and approval in this state from its use in the well-known California text-book, Page on California Street Law, page 891, section 7.

Also, if there had been a special demurrer, it does not appear that the facts were such that the answer could not have been so amended as to obviate the objections made. (*Ransome-Crummey Co. v. Bennett*, *supra*.)

The judgment is reversed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1944. Third Appellate District.—April 14, 1919.]

KARL SPROGIS, Appellant, v. DRURY BUTLER,
Respondent.

[1] NEGLIGENCE—ACTION FOR PERSONAL INJURIES—EXTENT OF INJURIES—FINDINGS—EVIDENCE.—In this action to recover damages for personal injuries sustained by plaintiff as a result of his collision, while riding a bicycle, with an automobile driven by the defendant, the findings of the trial court with respect to the extent of the plaintiff's injuries were justified by the evidence.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge. Affirmed.

The facts are stated in the opinion of the court.

Thomas H. Christiansen for Appellant.

Butler & Swisler for Respondent.

BUCK, P. J., *pro tem*.—This is an action to recover damages for personal injuries sustained by plaintiff as the result

of his collision, while riding a bicycle, with an automobile driven by the defendant.

The accident occurred in July of 1915 and the case was tried in December of 1916 by the court sitting without a jury. Findings and judgment were given in favor of the plaintiff in the sum of four hundred dollars; but from this judgment the plaintiff has appealed, bringing up all of the testimony under the alternative method.

[1] In its brief plaintiff contends that the findings with respect to the extent of the plaintiff's injuries are not justified by the evidence and that the evidence without substantial conflict shows that plaintiff sustained permanent injuries which will make him a cripple for life; and that he has been and will be in the future prevented from working at his trade as a carpenter; and that consequently the judgment awarded him by the court in the sum of four hundred dollars is wholly inadequate and insignificant and that the court "was biased and prejudiced against the appellant and that as a result thereof he did not have a fair trial."

In this case the not unusual duty was imposed upon the trial judge of making his findings from evidence of a very conflicting character; and the only power that this court has in the premises is to determine whether or not there is in the record any sufficient evidence or any reasonable inferences that may be drawn therefrom to sustain the findings. For under the law of the land the trial tribunal to which the plaintiff chose to submit his case is the sole and exclusive judge of the credibility of the witnesses and of the value and effect of their evidence.

In this case the claimed injuries of the plaintiff, were of a subjective nature and depended for proof so entirely upon plaintiff's own testimony and statements that it became specially incumbent upon the trial court thoroughly to test the credibility, accuracy, and good faith of the plaintiff as a witness.

The following is some of the testimony which is sufficient to justify and sustain the findings in this case:

First, in regard to the violence of the collision which plaintiff claims was the cause of his "invisible" injuries. Plaintiff himself testified that while he was riding his bicycle on the public highway, defendant came at the rate of thirty miles per hour in his automobile directly behind him, striking the

bicycle and "throwing me off the wheel and on the front part of his machine. After I was knocked off the wheel I was on the ground between the pavement and the wheel. The left-hand wheel of the front part of the machine caught me in the middle of the back and the machine went about fifteen feet, between ten and fifteen feet before it stopped. The automobile dragged me under the wheel on top of the pavement for a space of ten or fifteen feet. I was lying on my face toward the pavement." On the other hand, three disinterested witnesses on behalf of the defendant testified in substance that the car "did not travel at all after hitting the bicycle. Possibly it moved a foot but not more than that. The plaintiff was not dragged one foot, probably, or I would not call it that. I would say now, he was not dragged at all."

Second, as regards the visible and tangible evidence of the effect of the collision plaintiff testifies: "I was visibly injured up from my wrist to the middle between the shoulder and elbow—torn off the skin part of the flesh like with a scraper about three inches in width." Immediately after the accident appellant, at his own request, was taken to the office of his family physician, who testified as a witness on his behalf at the trial that "he had an abrasion on the right arm, the fore arm, extending from two or three inches above the wrist up to a little above the elbow about two or three inches wide—it looked red and raw, just took off the superficial lesion of the skin, a little deeper cut." Also, "a small abrasion on the left hand, back of the hand and fingers as near as I can remember. There were no abrasions or bruises on the back—no skin wound at all. Without an abrasion of the skin at all. Q. Has there been any change in the condition of his back from the end of say three months of the time of the injury? A. No. From then on the symptoms were subjective, what we call subjective symptoms to me. Nothing that demonstrates to anyone else,—unless there was a tenderness to the pressure. Q. (By the Court.) In your opinion, is the patient suffering continual pain now at the present time? A. Well, that, of course, is a subjective inference. I have no reason to think that he is,—that he does not feel weak and feel some sensation there. I do not know if it would be an out-and-out pain. . . . A long time after the injury I got an X-ray that shows that all the vertebrae is in line, of proper position; no evidence of bones having been broken."

Plaintiff also produced at the trial as a witness on his behalf Dr. E. W. Twitchell. In his brief counsel states that Dr. Twitchell's testimony was largely founded on hypothetical questions. But Dr. Twitchell at the trial testified that he had "made an examination of the plaintiff in this case—which extended for an hour or more. . . . I made what I believe was a very thorough examination. . . . To be frank, I am not able to state exactly what is the matter with his back. I have examined him carefully, but I was not able to make any definite finding, that is, rather nothing which evidenced any anatomical changes—anything which I could demonstrate to anybody else. Q. You found no condition which indicated that there had been an injury to his back? A. No. If he had come to me, if a person, like anybody and said nothing to me, and I examined him, after I got through, I would not be positive sure there was anything wrong with him. . . . I found no deformity, no anatomical changes; no swellings, no bruises; no scars. . . . No apparent injury to the muscles or nerves." On behalf of the defendant, Dr. C. B. Jones testified that as the result of an examination of the appellant at the time of the trial: "I found the man extremely well developed muscularly, so far as the movements are concerned of the body. Every joint seems to be an absolute normal movement. The spinal column is movable in every direction, twisting and bending. Bends backward and forward, both lateral movements. The muscularity of the spinal column is more or less sensitive; he holds it in tension considerably. By directing his attention to other parts, I was able to get him to relax the muscles. They relaxed the same as a normal back. Just as he was bending forward, leaning over in the position the muscles tightened up, he could not relax, did not relax himself. In moving other parts of his body, the muscles that were held tense became relaxed giving perfect movement of the spinal cord. In manipulating the spinal column by the hands, I could find no displacement of the vertebrae, the vertebrae column itself. I could get extreme bending in the lumbar region and in the cervical region,—those two movements of the spinal cord. . . . I watched the man as he walked; I saw no limping or lameness of any character which sustains my conclusion of my examination. . . . I found no chronic sign. This indicates there is an absence of inflammatory condition of the spinal cord." Dr. Jones was then asked

by respondent's counsel a hypothetical question framed by the plaintiff's attorney and based upon a large number of subjective symptoms narrated by the plaintiff as a part of his testimony, such as the violent and terrific character of the collision, his suffering great pain in the small of his back, his inability to walk at all for two weeks and his ability for the ensuing three months to walk only with great difficulty and with great pain and the continued existence of this pain and weakness in the back, and his inability to bend his back either forward, backward, or sidewise without severe pain and suffering, his inability to walk except very slowly and for short distances and with great pain, etc. Assuming these conditions to exist, the doctor stated that he would "expect him to be suffering from an injury to the back. Q. Taking, now, the basis of this hypothetical question, and add to it the further facts that after a physical examination of the back there were no physical signs of injury. No physical signs of any injury to the bones or muscles, what, then, would be your opinion as regarding the nature of this injury? A. From my examination I would term the condition as I find there is what we call traumatic spine. If he was hurt in a railroad accident, they would call it a railroad spine. It is an indefinite injury in which it is impossible to find any spot or definite lesion. The characteristics of these injuries are, the fact is there is a psychic condition as well as the injury. Of course we know that a man that is injured, we know that condition has something to do—there is a psychic condition,—the mental attitude mixed with the injury. From my past experience, and from the history of such cases, and the authorities which we go by, we find that individuals of this character are cured, either by receiving a certain amount or sum for their injury, or else by not receiving a certain amount. When they find out they cannot, there is no further recourse for them, they will go back to work, either immediately or very shortly afterward and be cured of their injuries." Furthermore, Dr. Twitchell, plaintiff's own witness, testified: "I regard him [plaintiff] as a man of what we call a neurotic type, that is rather characteristic of his nationality—he is from a province in Russia, a province, a country where I am in the habit of seeing that decided mental action,—is due to shocks of any sort, mental and physical shocks. Q. Is that condition such that, after this suit is over, he will im-

prove? A. I should say that a suit of this kind would have a very profound impression upon an individual of his type, that is to say, genuinely affects his condition without any connivance on his part. Q. Is the condition such a condition that after this suit is over he is very liable to improve? A. That would depend likewise on the conditions; if the court disappointed him, he would be that sort of an individual who would be very much disappointed,—gross disappointment, that sort of thing. Q. Doctor, so far as you are able to discover, there is nothing in his injury, physical condition, that would cause him to get worse as a result of his injury, it would be more the result of his disappointment? A. Yes, I should say so. I would not expect him to get worse because of the condition, on account of his physical condition, so much as I would on account of the other."

There is nothing in the record to justify or warrant appellant's charges that the plaintiff did not have a fair trial as a result of bias or prejudice on the part of the court or that the record discloses any bias or prejudice. In asking questions of the witness the court acted with a due and proper sense of the responsibility cast upon him by the duty of his office to try the case according to all the evidence available to him from the witnesses on the stand. There is no evidence to show that by any act or conduct of the judge the witnesses were coerced or attempted to be coerced into telling anything except what they believed to be the truth. The findings attacked were therefore not contrary to the evidence and the judgment is therefore affirmed.

Burnett, J., and Hart, J., concurred.

[Civ. No. 2743. First Appellate District, Division Two.—April 15, 1919.]

A. C. DUERR, Respondent, v. WILLIAM R. SLOAN et al.,
Appellants.

- [1] ACCOUNT STATED — ACTION UPON — RECOVERY.—In a suit upon an account stated, the plaintiff must recover upon the account stated or not at all.
- [2] ID.—NATURE OF.—An account stated constitutes a new contract, either express or implied, into which all prior negotiations merge.
- [3] ID.—BASIS OF.—An account stated must be based on prior dealings out of which an indebtedness arose.
- [4] ID.—ARCHITECT'S SERVICES—RENDITION OF BILL—FAILURE TO OBJECT—IMPLICATION.—Where a bill for architect's services in connection with the construction of a building is rendered to the owner, in care of her agent, and neither such owner nor her agent objects to the account, the implication of an account stated thereupon arises as a matter of law.
- [5] PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—RIGHTS OF THIRD PERSONS.—Where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal.
- [6] ID.—KNOWLEDGE OF AGENT IMPUTED TO PRINCIPAL — FAILURE OF AGENT TO COMMUNICATE.—The fact that an agent fails to communicate certain knowledge to his principal cannot change the rule of law that the knowledge of the agent is imputed to the principal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

Sterling Carr for Appellants.

Keogh & Olds for Respondent.

BRITTAIN, J.—The defendants, substituted as executors of her will on the death of Sarah A. Bryan, appeal from a judgment on an account stated, for architects' services, assigned by O'Brien & Werner to the plaintiff.

In 1911 Mrs. Bryan owned an unimproved lot in San Francisco upon which was erected an apartment house of six stories, known as St. Anthony building. It cost ninety thousand dollars and was accepted September 23, 1913. On September 29, 1913, a statement was sent to the office of W. A. Sloan reading as follows:

“September 29, 1913.

“Mrs. Sarah A. Bryan,

“c/o W. A. Sloan,

“Mills Building, City.

“First set of plans and specifications for seven story steel frame Fire Proof Building to be erected on Geary & Hyde Streets.....\$2500.00

“Architectural services rendered for 2nd set of plans including details, specifications, and superintending based on cost of \$90,000.00

@ 5% 4500.00

\$7000.00

“By cash 3000.00

“Balance due\$4000.00”

The first set of plans, for which, on the statement, there was a charge of two thousand five hundred dollars, was prepared by the architects, together with specifications for a class A building upon the order of Jesse Bryan and Sloan. Bids for the construction of the building were being received when Jesse Bryan died. J. S. Bryan, a brother of Jesse Bryan, then instructed the architects to call the matter off and that they would take it up later on. Subsequently Sloan and J. S. Bryan did take the matter up with the architects and ordered the preparation of plans for the cheaper class C building which was erected. The first set of plans was used as a basis of the second set, at least as to the floor plans. The two Bryans were the sons of the owner, and Sloan was her brother.

Before the contract for the building was executed Sloan took to Mrs. Bryan a note and mortgage, which she executed without reading, upon which Sloan advanced the money for the payment of the building bills. Mrs. Bryan left everything about the building to Sloan. John Bryan mentioned the matter of the mortgage to her, and she told him to go

ahead and do everything that was necessary. After the mortgage was signed, Sloan took to Mrs. Bryan the building contract, which she also signed without reading. Sloan watched the progress of the building and paid all the bills. Neither O'Brien nor Werner ever met Mrs. Bryan, but on one occasion she telephoned to one of them, stating that she learned the name "St. Anthony" was on a foot-mat at the door, and as Jesse and she had a sentiment about this, she wanted the name taken up from there and put over the door. Later Mr. O'Brien telephoned to Mrs. Bryan with reference to something about the building, and she told him she knew nothing about it and had nothing to do with it. She testified she left the matter to Mr. Sloan.

[1] On behalf of the appellant many cases are cited to the proposition that in a suit upon an account stated, the plaintiff must recover upon the account stated or not at all, and that in this suit recovery cannot be had upon the original items of account. There can be no question of this rule.

[2] If an account was stated, it constituted a new contract, either express or implied, into which all prior negotiations merged. (*Gardner v. Watson*, 170 Cal. 570, [150 Pac. 994].)

Numerous citations are made to support other equally well-established rules. [3] An account stated must be based on prior dealings. In this case when the account was sent to Mrs. Bryan in care of Sloan the prior dealings between the parties had resulted in the completion and acceptance of the building. There must have been a pre-existing indebtedness. Upon this proposition counsel for the appellants quotes from 1 Corpus Juris, 681. Neither the text nor the cases cited would support a contention that where a bill for services is rendered and the benefit of the services has been received, the party charged may not expressly agree to the value of the services and create an account stated by an approval indorsed on the bill. The only difference between an account stated thus expressly created and one where the contract is implied by reason of the silence of the party receiving the account is that in one case the person charged says the account is correct, and in the other fails to say it is incorrect.

[4] In this case the work was done, and the bill was rendered to Mrs. Bryan in the care of Mr. Sloan as her agent. If neither Mrs. Bryan nor Mr. Sloan, as her agent, objected to the account, the implication of an account stated there-

upon arose as a matter of law. Upon the question of whether there was an objection or not, the evidence was conflicting. The lower court determined this question in favor of the respondent. This court is bound by that determination. The account must have been brought home to the party to be charged in order to bind her by her silence. At the time the account was rendered and during the construction of the building, Mr. Sloan was in charge of the entire matter, with the consent of Mrs. Bryan. It is contended that his agency was not shown. This matter was also determined by the lower court adversely to the appellant. If there were conflict of evidence on the subject, the finding of the court would be conclusive here, but in view of the statements of Mrs. Bryan on her deposition, statements made by Mr. Sloan and John S. Bryan to the effect that she had never conferred authority upon them amounted merely to their conclusions, and there was no real conflict of evidence. The finding is conclusive.

[5] Apart from the determination of agency existent at the time the account was rendered, it is contended that at the time of the employment of the architects by Jesse Bryan and Sloan to prepare the first set of plans, the plaintiff failed to show either an actual agency or an omission or action on the part of Mrs. Bryan which could have generated a belief in the minds of the architects at that time on the subject of agency; hence, that no ostensible agency was shown. Many cases are cited upon these elementary principles of agency. In regard to these authorities, as in fact all other authorities and statements of law made on behalf of the appellant, on the oral argument the attorneys for the respondent conceded that the law was as stated and the authorities supported the statements of law. The learned counsel for the appellants has overlooked the rules of law under which a principal may be bound, even though at the time a third party deals with another there was no agency. The person sought to be charged by accepting the fruits of the dealings may be held as principal upon the theory of ratification. Further, the rule is too well established to require citation of authority that where one deals with another believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person with whom he dealt or from the undisclosed principal. In

this case Jesse Bryan discussed the matter of the building project with his mother. He attended to her affairs. He and Sloan ordered the first set of plans, which was used as the basis of the second set of plans ordered by Sloan and John S. Bryan, on which the building was erected. Sloan had entire charge of it. Mrs. Bryan had the benefit of the work. As is so strongly urged on behalf of the appellant, the suit here is upon the implied contract of the account stated. The sole question was whether, in view of the dealings prior to sending the account, Mrs. Bryan should be held by the implied contract of the account stated. There was evidence to support the finding of the lower court upon which the question was resolved against the appellants.

[6] On behalf of the appellants it is argued that reliance upon the account stated amounts to a fraud upon Mrs. Bryan. This claim of fraud is not pleaded. It is based upon the definition of actual fraud as a suggestion of a fact which is not true by one who does not believe it to be true. It is argued that since the architects rendered a bill, which counsel for the appellants says was not warranted, it was a suggestion of an untrue fact. To follow the further argument of counsel for the appellants upon this proposition, it would be necessary to assume that when the architects rendered their bill addressed to Mrs. Bryan in the care of Mr. Sloan, who had paid all other bills, they anticipated that he would fail to inform his principal of the receipt of the bill. The knowledge of the agent is imputed to the principal. The fact that Mr. Sloan testified he had never communicated with Mrs. Bryan in regard to the account cannot change the rule of law imputing his knowledge to Mrs. Bryan. Neither can it affect the rule that an account stated is implied from failure to make timely objection to an account based upon antecedent dealings.

It is claimed the legal principle of ratification cannot be invoked in aid of the respondent, and appellants rely upon section 2334 of the Civil Code to the effect that the principal is bound by the acts of his agent under a merely ostensible authority to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value upon the faith thereof. In this suit the plaintiff sought to recover only by reason of the rendition of the account and its retention without objections. At the time

of the rendition of the account there was no question of ostensible agency. Sloan was the agent of Mrs. Bryan. There were antecedent dealings of which she accepted the benefits. Sloan, her agent, knew all about them. The evidence fully sustains the findings. It is contended that the motion for nonsuit should have been granted. The grounds of the motion were substantially those which have already been discussed on which the appellants rely to show the evidence did not sustain the findings. The lower court held there was sufficient evidence at the time of the motion to require the defendants to proceed. The motion for nonsuit was properly denied. It was coupled with an order denying motion to strike out substantially all the evidence introduced on behalf of the plaintiff. The contentions in regard to striking out the evidence and on objections to its admission were on the same grounds as those in support of the argument that the findings were not sustained. The motion was general in terms, as were the objections to the evidence. There was no error in denying the motion to strike out and none in the admission of evidence.

The judgment is affirmed.

Langdon, P. J., and Haven, J., concurred.

[Civ. No. 2716. First Appellate District, Division Two.—April 15, 1919.]

RICHARD LUTGE, Respondent, v. DUBUQUE FIRE AND MARINE INSURANCE CO., Appellant.

- [1] **FIRE INSURANCE—PREPONDERANCE OF EVIDENCE—PROVINCE OF APPELLATE COURT.**—Whatever the justices of the appellate court may think as to the preponderance of the evidence, they may not substitute their opinion for that of the jury wherever there is a fair, reasonable ground for a difference of opinion.
- [2] **ID.—CONFLICTING EVIDENCE—VERDICT—APPEAL.**—In this action to recover upon a fire insurance policy which the defendant company claimed had been canceled at the time it settled the claim for a previous fire on the premises, the evidence was such that the appellate court could not hold that there was no substantial conflict in the evidence, or that the jury rendered a verdict which was unsupported by the evidence.

[3] **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence where the new evidence is merely cumulative.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

Courtney L. Moore, Coogan & O'Connor and Perry Evans for Appellant.

Thomas A. Allan and Geo. K. Ford for Respondent.

LANGDON, P. J.—This is an appeal by the defendant from a judgment rendered against it in a suit to recover upon an insurance policy issued by defendant company covering loss by fire. The facts of the case are briefly these: The plaintiff was the owner of a building in San Francisco which was insured against fire by defendant. The policy had been in force for some years. The fire which caused the loss upon which suit is brought occurred on August 7, 1915. Prior to that time, to wit, on July 10, 1915, a small fire on the premises had occurred. The insurance company settled the claim therefor by paying the plaintiff \$18, and it is claimed by the defendant that upon making this payment the policy was canceled by attaching to the draft sent to plaintiff a receipt which contained the statement, just above where plaintiff placed his signature, "Said policy is hereby surrendered for cancellation," and that Lutge by signing the receipt containing this statement consented to the cancellation of the policy. This is the one issue between the parties, and the appellant contends that the evidence is insufficient to justify the implied finding of the jury that the policy had not been canceled prior to the loss, and, further, that the trial court abused its discretion in denying to the defendant a new trial.

Appellant's argument upon the weight of the evidence has much force, but it is one that should properly be addressed to a jury. [1] Whatever we may think as to the preponderance of the evidence, we may not substitute our opinion for that of the jury wherever there is a fair, reasonable ground for a

difference of opinion. It is true that the claim of the appellant that the words purporting to cancel the policy were a part of the receipt at the time it was signed by the plaintiff is upheld by the testimony of the clerk in defendant's employ who prepared the draft; by the testimony of the general agent of the defendant company who signed it, and by the testimony of an insurance broker to whom it was sent by the defendant and who in turn delivered it to plaintiff. There is the further testimony of the insurance broker to the effect that he specifically called plaintiff's attention to the fact that the insurance policy was canceled, and that plaintiff replied that he did not care. On the other hand, the plaintiff denied that the words "surrendered for cancellation" were on the receipt when he signed it, or that he had any notice of any kind that the policy was canceled, or that he consented to the cancellation in any way. There are the additional circumstances that the insurance company did not accompany its receipt alleged to have embodied the agreement for cancellation with any letter calling attention to the cancellation; that the policy was in the possession of the plaintiff at the time of the fire and had never been surrendered and its surrender had not been demanded by the defendant; that the defendant company had not offered, prior to the loss, to return to plaintiff the unearned premium paid upon the policy; that, after the loss occurred, plaintiff employed an insurance adjuster to present his claim, who notified the defendant of the loss and presented the preliminary proofs of loss on August 25th; that five days thereafter the defendant replied to this letter, making some technical objection to the proofs, but not intimating in any way that the policy had been canceled, and it was not until September 14th that the defendant asserted that the policy had been canceled and denied liability thereunder. [2] We cannot, under such a condition of the evidence, hold that there was no substantial conflict in the evidence, and that the jury rendered a verdict which was unsupported by the evidence.

The only other point made by appellant is that the motion of the defendant for a new trial should have been granted. The affidavits filed upon the motion are all to the effect that the printed receipt had been altered and the words "surrendered for cancellation" made a part thereof before it was signed by the plaintiff. The statements in the affidavits con-

stituted material and valuable evidence for the defendant, but such evidence was merely cumulative and it should have been produced upon the trial. Defendant did produce evidence upon this very question in the testimony of the clerk of the defendant company who prepared the draft, in the testimony of the general manager who signed it, and in the testimony of the broker who delivered it to the plaintiff. Defendant, therefore, anticipated that this would be an issue in the case, and, after the decision has been adverse to it, it may not retry the case in order to produce other and perhaps stronger evidence upon a question which was contested at the trial, when such evidence was available to the defendant at the time of the trial. [3] A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence where the new evidence is merely cumulative. (*People v. Selby S. & L. Co.*, 163 Cal. 84, [Ann. Cas. 1913E, 1267, 124 Pac. 692, 1135]; *Estate of Walden*, 166 Cal. 446, [137 Pac. 35]; *Wood v. Moulton*, 146 Cal. 317, [80 Pac. 92]; *Estate of Doolittle*, 153 Cal. 29, [94 Pac. 240].)

The judgment is affirmed.

Brittain, J., and Haven, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court, was denied by the supreme court on June 12, 1919.

All the Justices concurred.

[Civ. No. 2671. First Appellate District, Division One.—April 15, 1919.]

C. **SHERMASTER**, Respondent, v. **CALIFORNIA HOME BUILDING LOAN COMPANY** (a Corporation), Appellant.

- [1] **STREETS — DEDICATION — UNEXECUTED INTENTION.**—An unexecuted intention to dedicate certain land to street purposes is not sufficient to constitute dedication.
- [2] **VENDOR AND VENDEE — REPRESENTATION AS TO PUBLIC STREET — NATURE OF.**—A representation by the vendor of real property that

the lands front on a named public street relates to the means of physical access to the property, and does not refer to an intangible quality in the roadway giving it the status of a public street.

- [3] **ID.—FALSE REPRESENTATION AS TO STREET—RIGHTS OF VENDEE.**—A false statement by a vendor that the real property agreed to be sold to the vendee is bounded by a public street, on the front, is a most material representation, and upon discovery that such representation is false, the vendee is entitled to demand, and recover, the consideration paid by him, also to recover the value of the improvements made on the premises, after deducting therefrom the fair rental value of the property.
- [4] **ID.—KNOWLEDGE OF TRUTH OF REPRESENTATIONS — ESTOPPEL.**—If the vendee avails himself of an opportunity to test the truth of the representations made by the vendor, and thereby discovers prior to the consummation of the contract that such representations are false, or by the exercise of reasonable diligence could have so ascertained, he will not be heard to say that he was deceived by them.
- [5] **ID.—REPRESENTATIONS OF VENDOR—RIGHT OF VENDEE TO RELY ON.**—Where the vendee, who was but a laborer and not accustomed to buying land, was given a map showing the existence of a street in front of the property, and the result of the physical examination of the property made by him, before entering into the contract to purchase the first lot, was not such as to destroy his belief in, and reliance on, the vendor's representations, he was entitled to rely on such representations.
- [6] **ID.—KNOWINGLY MAKING FALSE STATEMENTS—EFFECT.**—One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant of the truth, could have learned of the accuracy or falsity of the statements.
- [7] **ID.—DUTY OF VENDEE TO INVESTIGATE STATEMENTS OF VENDOR.**—One party to a contract is under no obligation to investigate and verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.
- [8] **ID.—ACT TO RESCIND CONTRACT — COMPUTATION OF AMOUNT OF JUDGMENT.**—In an action for the rescission of a contract for the sale of real property, a judgment for the plaintiff computed by adding the amount paid by the plaintiff on account of the purchase of the lots, plus interest, with a sum added for the "value of improvements placed on the land and premises, exclusive of any sum due defendant from plaintiff for use and occupation of said land

and premises since said contract of sale was entered into," is correct.

[9] **ID.—COST OF IMPROVEMENTS—EVIDENCE OF VALUE.**—In such an action, testimony as to the cost of the improvements placed on the land and premises is some evidence of value.

[10] **ID.—OFFER TO RESCIND—SUFFICIENCY OF.**—A written offer to rescind, accompanied by tender of a quitclaim deed to the premises upon given terms, is sufficient. The fact that the vendee demands more from the vendor than he is entitled to recover, in the absence of a specific objection made to the tender, does not invalidate such offer.

[11] **ID.—CONTINUANCE IN POSSESSION—WAIVER OF RIGHT TO RESCIND.** The right to rescind a contract for the sale of real property on the ground of fraudulent representations is not waived by remaining on the property after offer of rescission, where such occupancy is continued for the purpose of protecting the property for all parties to the litigation, and the vendor is not injured thereby.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. **Thomas F. Graham**, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

J. S. Hutchinson and Walter Slack for Appellant.

Henry L. Corson for Respondent.

WASTE, P. J.—Plaintiff had judgment rescinding and canceling two contracts of sale and purchase of real property, and defendant appeals.

From the findings of fact, which are amply supported by the evidence, it appears that the parties entered into two contracts in writing, whereby they mutually agreed that defendant should sell, and plaintiff should buy from defendant, two lots of land situated in the city and county of San Francisco. The particular description of the lot of land, in each contract, began as follows: "Commencing at a point on the westerly line of Wieland Street, distant thereon, etc., from the southerly line of Sunnysdale Avenue; running thence southerly along said westerly line of Wieland Street, etc."

[1] Wieland Street was not, at the time of making of the contracts, and never had been, a public street south of Sunnysdale Avenue. Some years previously the then owners

of the property filed in the office of the county recorder of the city and county of San Francisco private maps showing the existence of such street, and indicating thereby a probable intention to dedicate the land to street purposes. No evidence was offered to show acceptance by the city of this land, so indicated on the maps, or acts by anyone amounting to such dedication or user. An unexecuted intention of this character would not be sufficient to constitute dedication. (*Shultz v. Redondo Improvement Co.*, 156 Cal. 442, [105 Pac. 118]; *People v. Reed*, 81 Cal. 70, [15 Am. St. Rep. 22, 22 Pac. 474].)

Some reliance is placed by appellant upon a deed between private parties conveying from one to the other a strip of land, which appears to be coincident with the parcel, which the appellant claims is Wieland Street south of Sunnydale Avenue, but we see nothing in this private document creating a public easement for street purposes. There was testimony that negotiations appeared to have been commenced between the present owner of the property and the city and county looking to a possible dedication and opening of Wieland Street past plaintiff's land, deeds having been tendered for that purpose. But there was no showing that such result was presently probable, and no evidence which would in any way indicate that plaintiff, or anyone, had the right to use the strip of land represented by defendant to be Wieland Street, adjacent to the property in question, for street purposes.

Plaintiff believed, and relied on, the representations of defendant, concerning the existence of an open, public street, and would not have bought the lots, supposed to front thereon, had he known there was no way of reaching his property, other than over privately owned lands. He began living on the first lot purchased in April, 1914, and in June of the same year he executed the contract for the purchase of the second parcel. He first became aware of the true state of affairs when, in December, 1914, he found his property entirely cut off from any ingress or egress, by fences erected all around his property by the owner of the surrounding land. He demanded of defendant a rescission of the contracts, which, being refused, he executed and tendered quitclaim deeds of the property and brought this action.

It appeared from the testimony that during the preliminary negotiations leading to the signing of the first contract, defendants represented to plaintiff that the lot he was purchasing was bounded on the front by Wieland Street, that Wieland Street was an open street, south of Sunnydale Avenue, and that the property could be driven to in wagons from any direction. Plaintiff was shown a map or plat of the property on which Wieland Street was designated as fully laid out. Plaintiff visited the property before signing the contract, approaching it from Walbridge Street, which was on the south of the tract of land, going over the adjacent lots to reach it. He located the exact property by "stepping it off from Sunnydale Avenue." He saw a fence to the north, and between the land he was intending to buy and Sunnydale Avenue. On this fence was a sign bearing the name "Wieland Street" in large letters. There were no indications on the ground of a street leading to or adjacent to the property. Plaintiff communicated the fact of his discovery of the fence to the defendant's agent, who assured him that it was not rightfully there and he "would go out with an automobile and tear the fence down."

[2] We cannot adopt the suggestion of appellant on this appeal that the representation of defendant, alleged and found to the effect that the lands and premises described in the contracts "fronted on a public street, to wit, Wieland Street," had no relation to the means of physical access to the property, "but refers to an intangible quality in the roadway, giving it the status of a public street."

[3] The false statement, made by the defendant, that the real property, agreed to be sold to plaintiff was bounded by a public street, on the front, was a most material representation. Upon discovering that the representation was false, plaintiff was entitled to demand, and recover, the consideration paid by him. (*Shultz v. Redondo Improvement Co.*, *supra*.) He was also entitled to recover the value of the improvements made on the premises, after deducting therefrom the fair rental value of the property. (*Garvey v. Lashells*, 151 Cal. 526, [91 Pac. 498]; *Gates v. McLean*, 70 Cal. 50, [11 Pac. 489].)

The appellant contends that the plaintiff is estopped to claim a reliance on its representations, because he went on the land and examined it before signing the first contract,

and lived on that portion several months before buying the second piece. [4] Generally speaking, if one under such circumstances avails himself of an opportunity to test the truth of the representation made, and thereby discovers, prior to the consummation of the contract, that such representations were false, or by the exercise of reasonable diligence could have so ascertained, he will not be heard to say that he was deceived by them. (*Gratz v. Schuler*, 25 Cal. App. 117, [142 Pac. 899].) [5] But we do not believe it requires citation of authority to establish that the situation of the parties, in the present case, gave plaintiff the right to believe and rely on the representations made by defendant. The trial court found that he was a laborer, and not accustomed to buying land. The evidence before us as to the lots, their location, condition of adjacent streets, fencing thereabouts, and ways of ingress and egress, warrants the conclusion that they formed part of a larger, unimproved tract of land. All the streets in the vicinity appear to have been obliterated by the use of the tract as vegetable gardens. The result of the physical examination of the property made by plaintiff, before entering into the first contract, under these circumstances, was not such as to destroy his belief in, and reliance on, defendant's representations. He had been given a map showing the existence of the street. The assurance of defendant's agent concerning the fence would only serve to confirm his belief, and strengthen his reliance upon the truth of defendant's word.

The lots had been owned by the defendant for many years before the making of the contracts with plaintiff. The defendant knew that Wieland Street, adjacent to the property, was not a public street, and that there was trouble in relation thereto. The president of the defendant company testified that he was familiar with the condition of the streets and roadways in the tract, "having been out there probably two or three or more times a year since 1906." He further testified that "at none of the times he had been on the property was the portion of Wieland Street as shown on the map, south of Sunnysdale Avenue, extending through the property of Crim, open." The agent, Webb, to whom defendant intrusted the sale of the lots in the tract, testified that at the time of the sale he told plaintiff the condition of Wieland Street, and the fact that it was not a public street at tha

time, but that he thought it could be opened. On the issue presented by the conflict of evidence, arising from all the testimony bearing on this subject, the trial court found in support of plaintiff, and we are bound by the finding in that regard.

[6] "One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant with the truth, could have learned of the accuracy or falsity of the statements." (*Spreckels v. Gorrell*, 152 Cal. 395, [92 Pac. 1017].)

[7] "One party to a contract is under no obligation to investigate and verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith." (*Dow v. Swain*, 125 Cal. 674, [58 Pac. 271].)

[8] Plaintiff fenced a portion of his land, dug a well, put in a pump, and built a small house, all at a "cost" of more than five hundred dollars. The evidence relating to the value of the improvements placed on the property by the plaintiff seems to have been largely confined to the question of the cost. Only one witness (for defendant) fixed the value of the house at \$150. The court in its findings arrived at the amount of the judgment for the plaintiff by adding the amount paid by plaintiff on account of the purchase of the lots, plus interest, with \$250 added for "value of improvements placed on the land and premises, exclusive of any sum due defendant from plaintiff for use and occupation of said land and premises since said contract of sale was entered into." Provided there was evidence to support the finding in this regard, the method of determining the amount of the judgment was correct. (*Garvey v. Lashells*, *supra*; *Gates v. McLean*, *supra*.)

[9] The testimony as to cost of the improvements was some evidence of value.

Furthermore, no objection was made at the trial as to this method of fixing the value, which seems to have been acquiesced in by all parties and by the court.

The rental value of the property was established by a witness for defendant. While the court's finding is not as full

and explicit as it might be, we are of the view that it was justified by the evidence and is sufficiently clear to support the judgment.

[10] Appellant contends that the plaintiff did not give proper notice of rescission prior to the commencement of the action. When plaintiff found there was trouble about the street, he moved very promptly. He notified defendant, and was told by its officers, "the best thing to do is to see your lawyer, and we will see our attorney. We sold the property as we bought it." He did see his lawyer, who wrote to defendant, on behalf of plaintiff, "I am now making you an offer to rescind his contracts," describing them, "and Mr. Shermaster herewith makes you a tender of a quitclaim deed to all his interest in and to said land upon the payment to him of the sum already paid, etc.," specifying the amounts of purchase price (with interest), the cost of improvements and damages. Plaintiff had previously executed such a quitclaim deed and it was in the hands of his attorney for delivery.

Defendant, by its attorney, in reply to the notification by plaintiff, just referred to, wrote that it expected "to carry out to the fullest extent all their agreements with Mr. Shermaster [plaintiff]. They, however, do not accept any offer made by you to rescind his contracts. They also take exception to any alleged tender which you suggest in regard to a quitclaim deed." The communication further stated that when all payments had been made by plaintiff, defendant would "give him deeds in accordance with the terms of his respective agreements."

Here was a sufficient offer, and a direct refusal of rescission. Plaintiff demanded more from defendant than he was entitled to recover, but in the absence of any specific objection made to the tender, the exception thereto noted, availed defendant nothing, and must be now disregarded. (Civ. Code, sec. 1501; Code Civ. Proc., sec. 2076; *Kofoed v. Gordon*, 122 Cal. 314, [54 Pac. 1115]; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286, [70 Pac. 82].)

The contracts of sale were executory, and the acceptance of the quitclaim deed by defendant would have restored everything of value which plaintiff had received from it.

[11] It developed during the trial that after the offer of rescission, plaintiff remained, and was still living, on the

premises. He testified that unless he did so the house would be carried away, owing, no doubt, to its location in a sparsely inhabited neighborhood. Appellant contends that plaintiff, having remained in possession, cannot maintain this equitable action in rescission, but must be relegated to a legal action for damages for breach of contract. In our view, under the evidence, plaintiff's so-called possession was only an effort made in good faith to protect the property for all parties to the litigation. He had made a good tender of restoration of the premises which was refused. If he abandoned the premises the improvements would be carried away by vandals. He came into court and offered to do equity, when in his complaint he offered to make a quitclaim deed to the land to defendant upon cancellation of the contracts being adjudged. The court, in its decree, directed that such quitclaim be executed. We do not believe that plaintiff's remaining on the premises under the circumstances amounted to a waiver of his right to rescind.

Defendant has not suffered any injury by reason of plaintiff's act in remaining in such tentative possession, for the court found that the value of the improvements placed on the land, exclusive of any rental that might be due defendant for the use and occupation of the land, was the sum of \$250. We may assume that the court allowed defendant the sum of eight dollars per month for the use of the land, that being the sum fixed by its own witnesses, for the full period of the twenty-four months from the date of occupation by plaintiff to the trial. We may further assume that the court fixed in its own mind the value of the improvements at somewhere near the amount they cost, that being the course pursued in the examination of the witnesses by the court. The judgment as rendered appears to give defendant full credit for the reasonable use and occupation during the term specified, and under the circumstances it should not be heard to complain.

What we have last said also disposes of defendant's contention that the judgment was excessive.

The judgment is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 15, 1919, and a petition to

have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 12, 1919.

All the Justices concurred.

[Civ. No. 2645. First Appellate District, Division One.—April 16, 1919.]

GEORGE J. FERGODO et al., Appellants, v. W. H. DONOHUE et al., Respondents.

[1] ESTATES OF DECEASED PERSONS—PROBATE HOMESTEAD—ERRONEOUS DECREE—COLLATERAL ATTACK.—A decree made in the course of probate proceedings, upon the petition of the guardian of minor children of the deceased, and after due notice and hearing, setting apart absolutely in fee to such minor children certain separate property of the deceased, though erroneous, cannot be indirectly attacked.

APPEAL from a judgment of the Superior Court of Contra Costa County. A. B. McKenzie, Judge. Affirmed.

The facts are stated in the opinion of the court.

Cedric W. Peterson for Appellants.

Neal Power, W. S. Tinning, C. A. Gale and W. H. L. Hynes for Respondents.

KERRIGAN, J.—This is an action to quiet title. The complaint was in two counts. The cause was tried on the first count, and judgment went for the defendants. As to the second count a demurrer thereto was sustained, and plaintiffs having refused to amend, judgment by default upon that count was also entered against them. The plaintiffs appealed from both judgments. That relating to the default judgment not being seasonably taken, it was heretofore, upon motion made in this court, dismissed.

The question involved in the remaining appeal concerns the construction of an order setting apart a homestead to minor children. The facts are undisputed and simply told. The

property set apart was community in character, and had belonged to E. S. Fergodo and his wife. Mrs. Fergodo predeceased her husband, and the latter died in the year 1904, leaving him surviving as the result of this union eleven children, six of whom were minors. No homestead had ever been selected by either spouse in lifetime, but in the course of probate proceedings upon the estate of E. S. Fergodo, deceased, the court, upon petition of the guardian of the minor children, and after due notice and hearing, set apart absolutely in fee as a homestead to the minor children the property here involved. Subsequently the estate was closed, and the remaining property distributed to all the children, both adults and minors. After the latter reached majority they conveyed the homestead property to the defendants. No objection was made, at the time of the making thereof, either to the decree setting apart the homestead, or to the final decree of distribution, and no appeal was ever taken from either of them.

[1] It is conceded that the property had been the community property of E. S. Fergodo and his wife; and assuming for the purposes of this case that upon the death of Mrs. Fergodo the property became the separate property of the surviving husband within the meaning of section 1468 of the Code of Civil Procedure, and that therefore the court committed error in setting it aside as a homestead absolutely instead of for a limited time, still we think it was but an error committed in the exercise of its jurisdiction, which cannot be indirectly attacked. It has been so decided. In the *Matter of Moore*, 96 Cal. 530, [31 Pac. 584], the probate court had set aside to the widow of the deceased absolutely a homestead from the separate property of the deceased; and in a proceeding similar to the present the same question came before the supreme court which, in passing thereon, said: "If it should be conceded that the court erred in setting apart any portion of it absolutely to the widow, still it was only an error committed in the exercise of its jurisdiction, and the order was not void. No appeal was ever taken from this order, and it is now in full force. This being so, the court erred in distributing, as part of the estate, the land so set apart as a homestead. By force of the decree setting it aside, the title to the homestead is, as against the heirs of the deceased, in the parties named in that decree." (See, also, *Estate of Bette*, 171 Cal. 584, [153 Pac. 949]; *Rountree v. Montague*, 30 Cal. App.

170, [157 Pac. 623]; *McGavin v. San Francisco Protestant Orphan Asylum Society*, 34 Cal. App. 168, [167 Pac. 182].) Upon the authority of those cases the judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

[Orim. No. 463. Third Appellate District.—April 16, 1919.]

THE PEOPLE, Respondent, v. THOMAS R. HINSHAW,
Appellant.

- [1] **CRIMINAL LAW — EXAMINATION OF JURORS — BIAS OR PREJUDICE.**—Where counsel for defendant in a criminal prosecution, by means of certain questions asked prospective jurors on their *voir dire*, desires to show bias or prejudice, he should state his reason for asking the questions.
- [2] **ID.—FORGERY—SIMILAR OFFENSES—EVIDENCE OF.**—In a prosecution for forgery, evidence of other similar offenses is admissible for the purpose of showing guilty intent and of rebutting the theory of accident or good faith.
- [3] **ID.—CONFESSIONS—ORDER OF PROOF.**—In a prosecution for forgery, it is immaterial that the confession of the defendant is admitted in evidence prior to the introduction of any other evidence of the commission of the crime. The order of proof is a matter within the discretion of the trial court.
- [4] **ID.—EXTRAJUDICIAL CONFESSIONS—ADMISSIBILITY.**—In such a prosecution, extrajudicial confessions of the defendant alone are not sufficient evidence of the forgeries to render them admissible in evidence.
- [5] **ID.—ABSENCE OF WITNESSES — REFUSAL OF CONTINUANCE — WHEN NOT ERROR.**—In a criminal prosecution, the trial court does not commit error in refusing to continue the trial of the case on account of the absence of a witness for the defendant, where the application is made after considerable progress has been made in the hearing of the cause and no reason is shown why it was not made when the case was called for trial, as the statute requires, and the testimony of the witness, if produced, would be simply cumulative.

APPEAL from a judgment of the Superior Court of Humboldt County. Denver Sevier, Judge. Affirmed.

The facts are stated in the opinion of the court.

Metzler & Mitchell for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—There seems to be no substantial merit in this appeal from a conviction of the crime of forgery. The evidence was amply sufficient to support the verdict. It consisted in part of the confession of the defendant. This was supplemented by the testimony of a witness who positively identified appellant as the one who cashed the check and by the unequivocal denial of the genuineness of the signature by the purported maker or drawer of the instrument. Indeed, appellant does not claim that the verdict lacks sufficient support, but he relies upon certain alleged errors committed by the court in the progress of the trial.

Of these one relates to a ruling sustaining the district attorney's objection to these questions addressed to the prospective jurors on their *voir dire*: (a) "Now, if you are accepted as a juror and you enter the jury-room to deliberate and find a verdict, and you had once voted 'not guilty,' would you then change your vote to one of 'guilty' and if so, why? (b) When you are discussing the evidence and the law after the case has been put in the hands of the jury to deliberate, and you had forgotten some part or parcel of the evidence, or the jurors did not agree upon what is given in evidence, would you accept the statement of the fellow-jurors as to what evidence was given, or would you return to the court and have it read from the record? (c) If at any time during your deliberations, if you are accepted as a juror and you are in doubt as to the law given to you by this court, would you then rely upon the statements of your fellow-juror as to what the law is as applied to the facts in this case, or would you return to the court and ask the court to further instruct you?"

Without extended consideration of these questions we may say that it would be apparently difficult for any juror to answer them definitely and intelligently in advance of the contingencies therein suggested. Moreover, it is a fair inference from the remarks of the court that each of the jurors had stated that he would take the instructions as to these mat-

ters "from the court and not anybody else." In fact, it does not appear that the subject was not entirely covered by the other questions and answers which are not disclosed by the record.

[1] Besides, if appellant desired to show bias or prejudice, as he now claims, he should have so stated his reason for asking the questions. Furthermore, it appears that he must have been satisfied with the jurors, since he exercised only three of his peremptory challenges, and in view of the principles enunciated in *People v. Schafer*, 161 Cal. 573, [119 Pac. 920], it must be said that, if error in the ruling was committed, it was without prejudice.

[2] As to the admission of evidence of another forgery, it first appeared as a part of the confession of appellant of the commission of the crime charged in the information. It was embodied in his voluntary statement made to the sheriff and it was so closely connected with the recital as to the main offense that the confession was hardly divisible. At any rate, in this class of cases, evidence of other similar offenses is admissible for the purpose of showing guilty intent and of rebutting the theory of accident or good faith, [3] and it is not a vital consideration that the admission of the confession was prior to the introduction of any other evidence as to said checks. The order of proof is a matter within the discretion of the trial court. (*People v. Rushing*, 130 Cal. 449, [80 Am. St. Rep. 141, 62 Pac. 742].)

[4] It is true that extrajudicial confessions of defendant alone would not be sufficient evidence of the forgeries to render them admissible in evidence. (*People v. Baird*, 105 Cal. 126, [38 Pac. 633].) And it may be that the court committed a technical error in overruling the objections of appellant as to the other forgery, but other evidence in the nature of exemplars of his handwriting was subsequently received, so that the error, if any, was cured. We are satisfied that thereby a sufficient support was afforded for a finding that appellant forged the other check.

[5] There is some contention that the court committed error in refusing to continue the trial of the case on account of the absence of a witness for appellant. But the application was made after considerable progress had been made in the hearing of the cause, and no reason was shown why it was not made when it was called for trial as the statute requires.

(Pen. Code, sec. 1052.) Besides, it was quite apparent that the affidavit was radically defective, as appellant virtually admits. Moreover, the testimony of the witness, if produced, would be simply cumulative and there is nothing to show that it would have affected the verdict of the jury.

The only other objection is addressed to the action of the court in reference to the instructions. It seems unnecessary to notice specifically the various instructions offered on the part of appellant which were refused by the court.

After an examination of the record we are prepared to say that appellant suffered no prejudice by reason of the action of the court. The instructions were full and correct. Every principle of law necessary for the guidance of the jury was announced, and there is no ground for just criticism as to any of the proceedings during the trial.

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

[Crim. No. 465. Third Appellate District.—April 16, 1919.]

THE PEOPLE, Respondent, v. CHARLES SCHIAFFINO
et al., Appellants.

[1] CRIMINAL LAW—BURGLARY—VERDICT—EVIDENCE.—In this prosecution for burglary, the evidence, while largely circumstantial, was sufficient to support the verdict.

APPEAL from a judgment of the Superior Court of Lake County. M. S. Sayre, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. H. Brennan and T. M. O'Connor for Appellants.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

THE COURT.—Defendants were tried jointly for the crime of having feloniously and burglariously broken into and entered the store of Herrick & Brooks, in the town of Middle-

town, county of Lake, on the eighteenth day of September, 1918, "with intent then and there to commit a crime," and "then and there opened a safe by use of nitro-glycerine, contrary to the form, force and effect of the statute," etc. The jury returned a verdict of guilty as charged, and the court sentenced defendants to the state prison at San Quentin. Defendants appealed.

The clerk's transcript was filed January 25, 1919, and the reporter's transcript was filed February 6, 1919. Under rule II, the appellant in a criminal case is required to "file his points and authorities, with proof of service on the attorney-general, within fifteen days after the filing of the transcript." The cause was placed upon the April calendar and due notice thereof sent to defendants' attorneys. They have filed no points and authorities, and have not applied for further time in which to file points and authorities. At the call of the calendar there was no appearance for defendants and on motion of the attorney-general the cause was submitted on the record.

[1] We have read the evidence in the case and, while it is largely circumstantial, we cannot say it is insufficient to support the verdict.

The judgment is affirmed.

[Crim. No. 467. Third Appellate District.—April 16, 1919.]

THE PEOPLE, Respondent, v. FORTUNATO MEDAINI,
Appellant.

[1] CRIMINAL LAW — APPEAL — FAILURE TO APPEAR — EXAMINATION OF RECORD.—Where on appeal in a criminal case no brief is filed on behalf of the appellant and no appearance is made by or for him when the cause is, in its regular order, called for hearing and argument, and the case is submitted upon the record, it is not necessary that the reviewing court should enter into a minute examination of the facts. A general, or cursory, examination of the record is all that is required.

APPEAL from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge. Affirmed.

The facts are stated in the opinion of the court.

E. S. Bell for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—Early on the evening of July 7, 1918, at St. Helena, Napa County, the defendant shot and killed his wife, Mary Medaini. The homicide appears to have been the result of jealousy or a suspicion on the part of the defendant that the deceased had been unduly intimate with an employee of the defendant. The defendant was arrested and in due time charged with and tried in the superior court of Napa County for the crime of murder. He interposed at the trial the defense of insanity. The jury found him guilty of murder of the second degree, and he was thereupon sentenced by the court to imprisonment in the state prison at Folsom. He appeals from the judgment and the order denying his motion for a new trial.

The transcript on appeal was filed in this court on the thirty-first day of January, 1919. The case was placed on the calendar of the late (April, 1919) term of this court for hearing, and the attorney for the defendant and the attorney-general regularly and duly notified of the day upon which it would be called for argument. No brief has ever been filed on behalf of the defendant in support of the appeals, nor was there any appearance by or for him when the cause was, in its regular order, called for hearing and argument. There was, therefore, no other course open to the attorney-general than to submit the case upon the record, or, perhaps, to move for a dismissal of the appeals. That officer chose the former course.

[1] While it is perhaps the duty of a reviewing court, where a criminal case, in which no appearance by brief or otherwise has been made for the accused, has been submitted upon the record, to give the record such an examination as will enable such court to determine whether obvious errors, likewise prejudicial to the accused, have been made, still, in such cases so submitted, the law does not cast upon the appellate courts the duty of scrutinizingly examining the record for the purpose of searching for possible errors which might

be found, upon mature reflection, to have been detrimental to the rights of the accused. If the record, upon its face, shows that error prejudicial to the accused has been committed—if, for instance, it plainly appears that the information states no public offense, then, no less in a case where no brief has been filed or oral argument made on behalf of the defendant than in a case wherein briefs have been filed and oral arguments presented, should a reviewing court hesitate to order a reversal. But, as stated, we do not regard it necessary, where a criminal case is submitted under such circumstances as this case has been submitted, that a reviewing court should enter into a minute examination of the facts. A general, or cursory, examination of the record is all that is required. This we have given this record. Indeed, in view of the fact that the defendant was tried for and convicted of the crime of murdering his own wife, and of the further fact that he set up insanity as a legal excuse for his act, we have gone further and examined with painstaking care both the evidence and the charge of the court. The defense, as the plea of insanity implies, admitted at the trial that Medaini shot and killed his wife, and the evidence clearly discloses that, unless the accused was at the time he fired the fatal shot bereft of all sense and reason, or, in other words, was insane, the killing amounted to a deliberate, legally unprovoked and cruel murder. As to the instructions, it is to be remarked that, in its charge, the court, with singular clearness, stated to the jury every principle or rule of law applicable and pertinent to the case as it was made by the information and the proofs. Nor, in our examination of the record, have we encountered any rulings touching the question of the legal propriety of any of the evidence which, even where strictly not correct, could have resulted in injury to the defendant. In a word, the cause appears to have been in all particulars well and fairly tried, and the defendant, therefore, accorded a fair and impartial trial.

The judgment and the order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 2798. Second Appellate District, Division One.—April 16, 1919.]

JAMES P. HOGAN, Appellant, v. EARLE C. ANTHONY, etc., et al., Respondents.

- [1] **CONTRACTS—SALE OF TRUCK—FAILURE OF SELLERS TO PERFORM—RESCISSION BY CONSENT.**—Where the sellers, without performance of their promise to furnish the buyer with a truck of a given capacity, in the absence of which no duty is imposed upon the buyer to pay the note given as payment, demand the return of the truck and the buyer complies therewith, a rescission by consent is implied from such acts.
- [2] **ID.—RESCISSION BY BUYER—COMPLIANCE WITH CODE.**—The refusal of the buyer to pay the note given in payment of the truck on account of the fraud of the sellers, and the returning of the truck upon the discovery of the fraud, is all that he is required to do by section 1691 of the Civil Code to accomplish a rescission.
- [3] **ID.—CONDITIONAL SALE—LEASE—TRUE CHARACTER OF AGREEMENT—FORM IMMATERIAL.**—While the law applicable is the same whether the agreement between the sellers and the buyer of a truck constitutes a conditional sale or a lease thereof, the sellers cannot, by designating the contract a lease, take from it its true character as a contract for the conditional sale of the truck where the parties clearly contemplate a sale by the one and a purchase by the other.

APPEAL from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge. **Reversed.**

The facts are stated in the opinion of the court.

Ralph E. Swing for Appellant.

A. D. Laughlin and Paul Nourse for Respondents.

SHAW, J.—Plaintiff, upon the judgment-roll alone, appeals from a judgment entered in favor of defendant.

As appears from the second amended complaint, filed after the decision of this court in a former appeal had by defendant wherein the judgment in favor of plaintiff was reversed (*Hogan v. Anthony*, 34 Cal. App. 24, [166 Pac. 861]), the parties, on August 13, 1914, executed a contract, the designa-

tion of which is "Lease and Conditional Sale of Automobile" (the subject thereof being an auto truck), upon which plaintiff at the time paid five hundred dollars in cash, and for the balance of the purchase price or rental of \$1,150 he executed his promissory notes, one of which was for the sum of one hundred dollars and by its terms due and payable on September 13, 1914. The writing contained a provision to the effect that the instrument should be construed as a lease with an option on the part of the plaintiff to acquire title to the truck for the sum of one dollar, subject to compliance with his covenants therein contained and payment of the notes according to the terms and conditions thereof.

The complaint embraces two counts, in one of which plaintiff alleges facts which, if true, he insists show a rescission of the contract, under and by virtue of which he is entitled to recover judgment for the five hundred dollars paid. The other is a common count for money had and received by defendant for the use and benefit of plaintiff.

On the former appeal the judgment was reversed, for the reason that, as shown by the complaint upon which the case was tried, the subject of the action was not the contract, designated "Lease and Conditional Sale of Automobile," under and in accordance with which possession of the truck was by defendant delivered to plaintiff, but a preliminary agreement in the course of the transaction, made the preceding day, and as to which the court, in distinguishing such preliminary and informal contract which contemplated the execution of the lease and conditional sale agreement here involved, says: "The facts . . . disclose a situation, during the period between the execution of the contract and the execution of the lease, in which the parties were engaged in closing a single transaction. Of this transaction, the lease was the conclusion and the culmination, and by it must the rights of the parties be judged. The respondent does not claim to have rescinded the lease. He denies its existence and expressly relies upon an alleged rescission of the contract, a paper merely preliminary to the lease and which was abrogated by it." (See *Hogan v. Anthony, supra.*) It thus appears that on the former appeal the court had before it a case the subject of which was the rescission of a different instrument from the one here involved.

On this appeal, in the absence of the evidence, the sole question presented is whether or not the findings, deemed to

be fully established, support the judgment. The court found that on the twelfth day of August, 1914, defendant agreed to sell and plaintiff agreed to buy the truck in question for the sum of \$1,650, at which time plaintiff paid the sum of five hundred dollars to be applied upon the purchase price of the vehicle, and agreed to pay the balance thereof in eleven monthly installments of one hundred dollars each, and one, the last, of \$50, all of which should be evidenced by promissory notes due and payable in accordance with the agreement; that on the next day, August 13th, plaintiff and defendant executed the contract, designated "Lease and Conditional Sale of Automobile," to which we have hereinbefore referred, and plaintiff made and executed the promissory notes in accordance with his agreement made the day before; whereupon the truck was delivered to plaintiff, who continued in possession thereof until September 18, 1914; that "at the time of entering into said contract . . . plaintiff had no knowledge regarding such trucks and so informed defendants and told defendants that he would have to rely entirely upon their representations . . . and . . . informed defendants the nature of his business and for what purpose he desired to use the said truck, and that he needed a truck . . . with a capacity of and capable of carrying and conveying from one to one and one-quarter tons of freight; . . . that he must have a truck that would haul and carry not less than from one to one and one-quarter tons, and that he could not use a truck of a less carrying capacity; that said defendants then and there represented to plaintiff that the truck so leased by plaintiff, as aforesaid, was a ton truck and that the same . . . had a hauling capacity sufficient for plaintiff's business . . . and that said truck would easily carry and haul one and one-quarter tons of freight. . . . That plaintiff relied upon each and all of said representations so made by defendants and believed them to be true and believed that the truck which said defendants were then offering to sell to him was a truck with a hauling capacity of not less than one and one-quarter tons; . . . that if it had not been for said representations so made by defendants, plaintiff would not have entered into said agreement and that it was by reason of said representations so made by defendants to plaintiff that plaintiff did enter into said agreement as hereinbefore found, and paid to defendants the said sum of five hundred dollars. That each

and all of the representations so made by defendants to plaintiff with reference to said truck and its carrying capacity, as aforesaid, were and are false and fraudulent, and the said truck so leased by said defendants to plaintiff, as hereinbefore set out, was in truth and in fact a one thousand five hundred pound truck . . . and did not have a carrying capacity of one ton or of one and one-quarter tons. That said defendants knew that said representations so made by them, as aforesaid, were false and fraudulent at the time they were made and said representations were so made by said defendants for the purpose of deceiving and defrauding said plaintiff, and for the purpose of causing him to enter into said contract, as hereinbefore found, and to pay to defendants the sum of five hundred dollars and to cause plaintiff to agree to pay the balance thereof in monthly payments. . . . Possession of said truck was delivered to said plaintiff on the thirteenth day of August, 1914, and thereafter plaintiff attempted to use the same in his business, but said truck could not be used successfully in his said business; . . . when plaintiff first began to use said truck he attempted to haul thereon about one ton of freight; when so doing said truck would heat up to such an extent that it could not be successfully used; plaintiff thereupon complained to defendant regarding such condition and defendant assured plaintiff that such condition was caused solely by the fact that said truck was new; plaintiff relied upon such statement of defendant that such heat was being caused by the fact that said truck was new, and continued to use the same; but said truck continued to heat and could not be successfully used by plaintiff in his said business; that plaintiff did not discover the fact that said truck was not a ton truck and was only a truck of one thousand five hundred pounds capacity until on or about the 26th of August; that immediately after discovering said fact plaintiff notified said defendant that said truck was not a ton truck and was not of a capacity which defendant had represented it to be; that plaintiff refused to make any further payments upon said contract solely by reason of such facts.

“That on the 18th of September, 1914, defendant . . . at the city of Upland demanded payment of the note then due; that plaintiff then refused to pay said note and also refused to make any further payments pursuant to said agreement unless defendant furnished plaintiff with a ton truck; that

on the said eighteenth day of September, 1914, plaintiff, at the request of defendant, returned said truck to defendant and said truck has been in the possession of defendant ever since; that plaintiff returned said truck to defendant because of the fact that the same was not as it had been represented to be and because of the fact that it could not be successfully used by plaintiff in his said business; that defendant never . . . furnished plaintiff with a truck of a ton capacity or of any other capacity"; and on demand made by plaintiff, prior to the commencement of this action, for a return of said five hundred dollars, refused to repay the same; that defendants did not at any time receive for the use and benefit of plaintiff the sum of five hundred dollars or any sum whatsoever; that no part of the one hundred dollar note which matured on September 13th, and for which defendants by answer sought to recover, had been paid."

Upon the foregoing facts the court concluded, as a matter of law, that plaintiff was entitled to nothing and that defendant Earle C. Anthony was entitled to recover upon the one hundred dollar note, and gave judgment accordingly.

The facts are quite similar to those involved in *Pepper v. Vedova*, 26 Cal. App. 406, [147 Pac. 105], and *Hackett v. Lewis*, 36 Cal. App. 687, [173 Pac. 111], in both of which cases plaintiffs recovered money the payment of which was induced by like deceit. Indeed, the findings quoted show that as a means of wrongfully obtaining plaintiff's money, defendants knowingly perpetrated the grossest fraud, and to uphold the judgment entered thereon would render the language of the legislature that "for every wrong there is a remedy" (Civ. Code, sec. 3523), and "no one can take advantage of his own wrong" (Civ. Code, sec. 3517), idle and meaningless declarations.

The acts of the parties had and taken, as shown by the findings herein, present a different case from that involved on the former appeal. That, as shown by the findings, plaintiff was entitled to rescind the contract of sale, admits of no controversy. Were the acts had and taken by the parties sufficient to constitute a rescission? The promised payment of the note as to which default was made was predicated upon the precedent promise of the defendants to furnish him with a truck of a ton or a ton and a quarter capacity. Defendants neglected and refused to comply with their promise, thus dis-

pensing with any obligation of performance on plaintiff's part to pay the note. (*Mansfield v. New York C. & H. R. R. Co.*, 102 N. Y. 205, [6 N. E. 386].) When for nonperformance defendants requested that plaintiff return the truck, he complied therewith, not because he was under obligation to do so, since he might have affirmed the contract and sued for damages, but, as found by the court, "*because of the fact that the same was not as it had been represented to be.*" A rescission may be accomplished by consent. (Civ. Code, sec. 1689.) [1] When defendants, without performance of their promise, in the absence of which no duty was imposed upon plaintiff to pay the note, demanded the return of the truck and plaintiff complied therewith, a rescission by consent was implied from such acts. [2] Assuming, however, that defendants did not consent to the rescission, nevertheless the act of plaintiff in refusing to pay the note on account of the fraud and returning the truck was all that he was required to do by section 1691 of the Civil Code, to accomplish a rescission. That section provides that in order to effect a rescission other than by consent, the party rescinding must, (1) upon discovery of the facts which entitle him to rescind, act promptly, with which provision plaintiff complied. "(2) He must restore to the other party everything of value which he has received from him under the contract." With this provision, waiving his right to exact restoration of the money paid as a condition of delivering the truck, he also complied, the result of which is that defendants have the truck and the five hundred dollars so wrongfully obtained from him.

[3] Respondent argues that the instrument was merely a lease for a stipulated monthly rental for the use of the truck, and that for default in the payment of such installments of rent they were entitled to and did retake the truck into their possession. Even were the instrument conceded to be a lease, the law applicable to the case is the same.

By the contract the parties clearly contemplated a sale by the one and a purchase by the other. Respondent cannot, by designating the contract a lease, take from it its true character as a contract for the conditional sale of the truck, which it was in fact. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Civ. Code, sec. 1648.)

"11.

The judgment is reversed, and upon going down of the *remittitur* the trial court is instructed to enter a judgment upon the findings in favor of plaintiff for five hundred dollars, together with interest thereon from August 12, 1914, and costs.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 13, 1919.

[Civ. No. 1914. Third Appellate District.—April 16, 1919.]

J. L. SYDNEY, Appellant, v. JOHN RICHARDS et al.,
Respondents.

[1] MINING LAW—NOTICE OF LOCATION—SUFFICIENCY OF DESCRIPTION.

In this action to quiet title to a copper mining claim, the trial court was justified in concluding that there was an honest attempt by defendants, who claimed under a prior notice of location, to locate said land, that there was a sufficient compliance with the requirements of the law, and that plaintiff had full knowledge of the extent of defendants' claim.

APPEAL from a judgment of the Superior Court of Mariposa County. J. J. Trabucco, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. P. Tuttle for Appellant.

John A. Wall for Respondent.

BUCK, P. J., *pro tem.*—This is an action to quiet title to a copper mining claim. The defendants Westfall and Beeves filed a disclaimer. The case was tried by the court sitting without a jury, and judgment was for defendant Richards, and plaintiff appeals. The land in question was unoccupied government mineral land and at the trial plaintiff attempted to prove that she had acquired title thereto by two distinct proceedings. First, that on January 1, 1911, she and one

Lisenby, through her husband, posted a notice of location upon the ground, and in 1913 performed more than one hundred dollars' worth of labor. Afterward this location was abandoned and on September 14, 1914, while the land as she claims was still unlocated, she made a valid location thereon by posting the proper notice.

As regards the location of January, 1911, the trial court found from conflicting evidence that the required assessment work for the year 1913 had not been done. Under the rule governing this court, this finding will not be disturbed.

[1] As regards the location of September, 1914, by plaintiff, there was offered in evidence at the trial a prior notice of location posted on the claim on March 11, 1914, by defendant which, over the objection of plaintiff, was received in evidence and was the basis upon which judgment in favor of defendant was rendered.

The question in controversy is whether this prior notice of location by defendant contained a sufficient description of the land sought to be located under the provisions of sections 1426 and 1426a of the Civil Code. The following is a copy of the notice of location:

“Notice of Location—Quartz Claim.

“Notice is Hereby Given, that the undersigned citizen of the United States has, in compliance with the requirements of the Revised Statutes of the United States has this day located and claim Fifteen Hundred linear feet along the course of this lead, lode or vein of mineral-bearing quartz, and Three Hundred feet in width on each side of the middle of said lead, load or vein, together with all mineral deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appurtenant thereto, situate in the Green Mountain Mining District, County of Mariposa, and State of California, and more particularly described as follows, to-wit: Commencing at a stone monument about 100 feet north of an old incline shaft, thence northerly 600 feet and southerly nine hundred feet along the vein or lode which is the center line of the claim. The shaft is located about 600 feet west of the N. E. Corner of Section 4, T. 8 S., R. 18 E., M. D. M. This claim shall be known as the Sunny Side Quartz Claim.”

The recent case of *Batt v. Stedman*, 36 Cal. App. 608, [173 Pac. 99], decided in this court since briefs were filed herein,

lays down the principles which will govern this court in considering the sufficiency of a notice of a mining location. Following other precedents, that case holds that "location notices should be liberally construed, having reference to the circumstances under which, and the character of the parties by which they are generally made; in determining the sufficiency of the location notice, the most important guide is the purpose of the notice, which is to identify the land claimed with reasonable certainty." Also the statute expressly provides that the description of the claim may be made "by reference to some natural object or permanent monument as will identify the claim located"; and that "in no case shall the claim extend more than one thousand five hundred feet along the course of the vein or lode nor more than three hundred feet on either side thereof, measured from the center line of the vein at the surface"; and that the notice must contain "the number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be." (Civ. Code, 1426, 1426a.)

Now, as regards the natural objects and monuments on the land which were attempted to be used by the defendant to "identify the claim located," the following appears from the testimony: The land in dispute is old mining ground and had been mined years before by the Guggenheims. In 1912, and prior thereto and at the time of the location, there was on the claim a 115-foot tunnel. Also the ground was all clear and with but a single tree on it. Also plaintiff's husband testified that he had known the land for years, that "discovery of copper-bearing ore had been made on the claim. There is a well-defined ledge on the claim, and the apex of the vein extends the whole length of the claim." And respondent testified: "On March 11, 1914, I discovered rock in place on the claim bearing valuable copper ore. I built my discovery monument on the vein at this point. It was made of rocks and was two feet wide and three feet high; and on that day I placed and posted [the above notice of location], on this discovery monument."

From the foregoing it will appear that there were upon the ground three objects, each of which objects were referred to by the locator in his notice, to wit, the well-defined ledge on

the claim, the apex of which "extends the whole length of the claim," the shaft, or tunnel, and the monument. The description in the first place makes the well-defined ledge "the center of the claim"; and, second, makes the stone monument referred to as the point of discovery the starting point for the measurement northerly six hundred feet and southerly nine hundred feet of an aggregate distance of "one thousand five hundred linear feet *along the course of this lead, lode or vein of mineral-bearing quartz.*" And the notice also defines the other dimension of the claim by like reference to this well-defined ledge on the claim as being "three hundred feet in width on each side of the middle of said lead, lode or vein."

And furthermore, by his own conduct, the husband of plaintiff, while acting for her, indicates that the monument referred to in defendant's location notice was a sufficient location of the point of discovery when he testifies: "I posted the Lone Tree mine location notice in the same monument of rocks where I found the Sunnyside mine notice of location." Furthermore, he gives no testimony from which it can be inferred that the notice of location posted by the defendant was insufficient to give him or any other person notice or information of the boundaries of defendant's location. His testimony in this action being as follows: "A few days after March 11, 1914, I was on the ground and found the notice of location of the Sunnyside Mine by defendant John Richards in a monument of rocks on the vein. I read this Sunnyside Mine notice of location at this time, and then put it back in the monument of rocks where I found it; I did not make any effort to follow the directions contained in the Sunnyside Mine location notice to find if any monuments had been placed to mark the claim. I have never made any such effort. The ground is all clear; some grass grows each year and there is but one single tree on the ground. By little effort I could have readily found and seen any monuments of rocks or any other monuments on the ground. I was advised that the Sunnyside Mine location was defective, for the reason that the notice of location did not contain enough writing, that it did not comply with the requirements of the statutes of the state of California, and that was my sole and only reason for making the Lone Tree location on the same ground as claimed by the Sunnyside Mine notice of location. I posted the Lone Tree Mine location notice in the same

monument of rocks wherein I found the Sunnyside Mine notice of location."

As stated by this court in the case of *Green v. Gavin*, 10 Cal. App. 330, at page 337, [101 Pac. 931, 933]: "We think the court below was justified in concluding that there was an honest attempt by defendants to locate said land, that there was a sufficient compliance with the requirements of the law—that plaintiff had full knowledge of the extent of defendants' claim."

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 12, 1919.

All the Justices concurred.

[Civ. No. 2673. First Appellate District, Division One.—April 17, 1919.]

NAOMI BOURGUIGNON et al., Respondents, v. PENINSULAR RAILWAY COMPANY (a Corporation), Appellant.

[1] **NEGLIGENCE—DERAILMENT OF CAR—RES IPSA LOQUITUR—PLEADING—PROOF—INSTRUCTIONS.**—Where in an action for damages for personal injuries received by a passenger upon one of the cars of a railway company which, through the alleged negligence of the latter, was derailed while rounding a curve, the complaint is fairly open to the construction that both general negligence on the part of the defendant in the management and operation of its car, and also specific acts of negligence on its part in maintaining a defective track and in rounding the curve at a dangerous rate of speed, are mingled in the same averment, and the case is tried upon the theory that the allegations of the complaint are such that upon proof of the accident and resulting injury a presumption of negligence upon the part of the defendant arises, and the court so instructs the jury, the defendant may not for the first time upon motion for a new trial, or upon appeal, raise the objection that the giving of instructions based upon the rule of *res ipsa loquitur*

was error, the plaintiffs having failed to prove that the accident was caused by the specific acts of negligence alleged in their complaint.

- [2] **ID.—CHARACTER OF ACCIDENT—PRESUMPTION OF NEGLIGENCE—HOW OVERCOME.**—Where an accident is of such a character that it speaks for itself and raises a presumption of negligence, the defendant will not be held blameless except upon a showing either of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. (Opinion of supreme court on denying hearing.)
- [3] **ID.—ACCIDENT TO PASSENGER—DEGREE OF CARE—PROOF.**—In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, the explanation or care shown, as the case may be, must be satisfactory in the sense that the carrier is held to a very high degree of care. (Opinion of supreme court on denying rehearing.)
- [4] **ID.—EXERCISE OF DUE CARE—BURDEN OF PROOF.**—In such cases, the defendant is not obliged to overcome the presumption of *negligence* by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation or of his contention that he exercised due care in all particulars as to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence. (Opinion of supreme court on denying rehearing.)

APPEAL from a judgment of the Superior Court of Santa Clara County. P. F. Gosbey, Judge. Affirmed.

The facts are stated in the opinion of the court.

Louis Oneal, Wm. F. James and James P. Sex for Appellant.

E. M. Rea for Respondents.

RICHARDS, J.—The plaintiffs in this action recovered judgment against the defendant for the sum of \$18,001.35 as

damages for personal injuries suffered by the plaintiff Naomi Bourguignon while a passenger upon one of the defendant's cars, through the alleged negligence of the defendant by reason of which said car was derailed and overturned while rounding a curve in the defendant's railroad.

The first and main contention of the appellant herein is that the trial court committed error in the giving and refusing of certain instructions having reference to the burden of proof in the case and the application of the doctrine of *res ipsa loquitur* to it in the light of the averments of the plaintiff's complaint with respect to the defendant's alleged negligence.

The averments of the complaint with respect to the defendant's negligence read as follows: "That the said car left the said rails and track and turned over on its side, as herein alleged, through the negligence, carelessness, and wanton recklessness of the said defendant in the management and operation of its said car, and the maintenance of said roadbed or tracks, and without any fault or negligence on the part of the said Naomi Bourguignon, and that at the time of said derailling of said car, the said plaintiff, Naomi O. Bourguignon, was occupying as a passenger a seat on the inside of said car, said seat being a seat provided for passengers by said defendant; that said car left said tracks on account of the sagging or giving way of one of the rails of said track, coupled with the negligent operation of said car, which consisted in going over said curve at a high rate of speed."

No demurrer was filed to the sufficiency of the complaint, but the defendant answered denying this averment, and the cause proceeded to trial. Upon the trial the plaintiff proved the fact of derailment and overturning of the car while she was a passenger upon it and the consequent injuries, and rested her case. No motion for nonsuit nor other objection to the sufficiency of the plaintiff's showing was made by the defendant, but it proceeded to introduce evidence tending to show an entire absence of negligence on its part and to support its claim that the injuries to the said plaintiff were the result of an unavoidable accident. Upon producing such evidence the defendant rested its case. Whereupon the plaintiff offered proof to rebut the evidence which the defendant had presented; and the cause having been submitted the court proceeded to instruct the jury. In so doing it gave certain

instructions, one of which was the following: "Plaintiff has established a *prima facie* case against defendant if she shows that she was injured by the overturning of the car while being carried as a passenger by defendant without fault on her part; in such case there is a presumption that the accident was caused by the negligence of defendant, and the duty is then upon the defendant to show that the accident happened from inevitable accident or from some cause beyond the power of human care or foresight to prevent." The court also gave certain other instructions which substantially restated the rule expressed in the foregoing instruction. The appellant now urges that the giving of these instructions was error, basing its insistence in that regard upon the proposition that the plaintiff having alleged specific negligence on the defendant's part, the rule of *res ipsa loquitur* as above stated does not apply, and hence that the plaintiffs were bound in the first instance to prove that the accident was caused by specific acts of negligence alleged in their complaint.

[1] There are several answers to this contention. In the first place, the averment of the plaintiffs' complaint above quoted is, we think, fairly open to the construction that both general negligence on the part of the defendant in the management and operation of its car, and also specific acts of negligence on its part in maintaining a defective track and in rounding the curve at a dangerous rate of speed, are mingled in the same averment. In this respect the case strongly resembles the case of *Roberts v. Sierra Ry. Co.*, 14 Cal. App. 180, [111 Pac. 519, 527], in which the precise question presented here arose, in dealing with which the court used the following words: "Plaintiff, however, not only alleged specific acts of negligence, but he also alleged general negligence. It is true that he did not set up his alleged specific and general negligence in separate counts, as was done in *Green v. Pacific Lumber Co.*, 130 Cal. 435, [62 Pac. 747], but there was no demurrer addressed to this feature of the complaint; the averments of the complaint were specifically denied, the evidence went in without objection touching the issues as thus presented, and defendant makes no pretense of being surprised. Inasmuch as there was an issue of general negligence presented, a presumption of negligence arose upon proof made of plaintiff's injury while a passenger on defendant's cars. And the case was tried upon

the theory that both specific and general negligence were alleged."

The closing passage of the above quotation furnishes an added reason why the point urged by the appellant cannot be held to be well taken. This case, like the *Roberts* case, was tried apparently upon the theory that the allegations of the plaintiffs' complaint were such that upon proof of the accident and of the resulting injury a presumption of negligence upon the part of the defendant arose; for when upon proof of the occurrence of the accident and of the resultant injuries the plaintiffs rested their case no motion for nonsuit or other objection to the sufficiency of the plaintiffs' showing in the first instance was made, but the defendant at once assumed the burden of proving the absence of any negligence on its part, and having tendered such proofs as it possessed upon this subject, proffered no objection to the plaintiffs' counter-showing upon the ground that it should have been made in the first instance. This court, in the case of *Roberts v. Sierra Ry. Co.*, *supra*, dealing with that precise condition, and quoting from 6 Thompson on Negligence, section 7473, said: "Where parties, without adhering closely to the written pleadings, proceed without objection and make a particular case by the evidence, and the court allows that case without objection to go to the jury, it is a violation of all correct rules of law then to assail the case thus made for the first time by the motion for a new trial, or the assignment of error in the appellate court on the ground of failure of proof."

The appellant further contends that the trial court in giving one of its instructions, wherein the foregoing rule with regard to the burden of proof is stated in a somewhat different form, erred in instructing the jury that the defendant must show "that the overturning of the car was the result of inevitable casualty which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs." The instruction from which the foregoing excerpt is taken was adopted by the trial court from the case of *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, [125 Am. St. Rep. 68, 93 Pac. 106], in which the precise instruction was approved by the supreme court. Aside from these considerations, however, we find from an examination of the record that the trial court not only gave the foregoing

instructions, but it then proceeded to give some thirty or more instructions covering every phase of this immediate subject, a large number of which instructions were prepared by the defendant and given at its request. In the light of these very full and very fair instructions it is impossible to perceive how the jury could have been misled to the defendant's injury in its deliberation upon the case. The appellant's objection that the trial court refused to give certain of its instructions is sufficiently answered by the liberality with which the court gave almost every one of the instructions requested and which fairly covered every phase of its defense.

We are further satisfied from a careful reading of the voluminous record herein that the evidence was amply sufficient to justify the verdict, not only as to the defendant's negligence, but as to the nature and extent of the injuries suffered by the said plaintiff.

Finding no error in the record, the judgment is affirmed.

Waste, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 16, 1919, and the following opinion then rendered thereon:

THE COURT.—The petition for rehearing is denied. Such denial, however, is not to be taken as a complete approval of the instruction that the defendant must show "that the overturning of the car was the result of inevitable casualty which human foresight and care could not prevent, for the law holds it responsible for the slightest negligence, and will not hold it blameless except upon the most satisfactory proofs."

[2] The true rule is that where the accident is of such a character that it speaks for itself, as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some

unpreventable cause, although the exact cause is unknown. [3] In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, the explanation or care shown, as the case may be, must be most satisfactory in the sense that the carrier is held to a very high degree of care.

[4] But the proof which is required of such explanation or care is a different matter from the explanation or care itself. The explanation or the care shown, if true, may be perfectly satisfactory. The proof of its truth may or may not be satisfactory. On this point the rule is the same as in the case of any other presumption which a defendant must meet, that is, he is not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation or of his contention that he exercised due care in all particulars as to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence. (See *Haun v. Tally*, ante, p. 585, [181 Pac. 80].)

The instruction in question was taken *verbatim* from *Bonneau v. North Shore R. R. Co.*, 152 Cal. 406, [125 Am. St. Rep. 68, 93 Pac. 106], where it was approved. An examination of that decision, however, shows that the criticism which the appellant there made of that particular instruction was not directed to the point that it required most satisfactory proof as distinguished from a satisfactory explanation or a showing of satisfactory care. The rule in regard to proof is discussed with reference to another instruction and is stated to be as above.

In the present case the instruction, while open to criticism in the particular indicated, could not have misled the jury when considered in connection with the other instructions given as to the effect of a presumption and the requirement that the plaintiff prove his case by a preponderance of evidence.

All the Justices concurred, except Lennon, J., who was absent.

[Civ. No. 1924. Third Appellate District.—April 17, 1919.]

J. S. HENDERSON, Appellant, v. E. LAUER & SONS
(a Corporation), Respondent.

- [1] **SALES—LOSS OF GOODS EN ROUTE—ASSUMPTION OF RISK.**—The risk of loss or destruction of goods while en route from seller to purchaser is placed where the title resides.
- [2] **ID.—C. O. D. SHIPMENTS—PASSAGE OF TITLE—INTENT—PRESUMPTION.**—Where goods are shipped C. O. D. and the bill of lading with draft attached is sent to the local bank of the purchaser, it will be presumed, in the absence of evidence showing a contrary intention, that the vendor did not intend that the ownership and right to the possession of the goods should pass to the purchaser until the draft was paid.

APPEAL from a judgment of the Superior Court of Modoc County. Clarence N. Raker, Judge. **Affirmed.**

The facts are stated in the opinion of the court.

J. T. Sharp for Appellant.

Jamison & Wylie for Respondent.

CHIPMAN, P. J.—It is alleged in the complaint that defendant “became indebted to R. F. Smith & Sons Company, Chicago, Illinois, in the sum of \$471.31, lawful money of the United States, upon an express contract, for goods, wares and merchandise, sold and delivered to said defendant” at its special instance and request; that before filing the complaint, Smith & Sons Company assigned the said claim to plaintiff and that no part thereof has been paid.

The answer denies the averments of the complaint except that defendant herein admits that it is indebted to plaintiff in the sum of \$31.91. The cause was tried by the court without a jury, and plaintiff had judgment for the sum of \$31.91 and interest, amounting in all to the sum of \$34. Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

The controversy arises out of a shipment of goods by plaintiff’s assignor to defendant of the value of \$440.40, which

before delivery were destroyed by fire in the warehouse of the railroad company at Alturas.

Witness Ryerson, bookkeeper and credit manager of Smith & Sons Company, testified that the shipment was "C. O. D. draft with bill of lading attached, the original bill of lading and draft sent to the First National Bank of Alturas." On November 13, 1914, Smith & Sons Company wrote defendant as follows: "We are to-day shipping your C. O. D. order given to our Mr. Laney sending draft for \$440.40 together with original invoice to the First National Bank at Alturas. When this draft is paid the bank will turn over the original invoice to you." It was admitted that the goods remained in the warehouse of the railroad company for seven months, and until destroyed, June 28, 1915. It appeared also that the bank at Alturas notified defendant that the draft and bill of lading were in its possession, soon after being received by it. In answer to a letter written by Smith & Sons Company, defendant of date July 22, 1915, wrote not to "be worried or alarmed over the claim of \$440.40," and requesting that company to present the claim to the railroad company, which it did; and which was refused payment on the ground, as testified to by the railroad company's general manager, that the company was acting only in the capacity of a warehouseman.

In its letter the Smith & Sons Company also said that if the railroad company would not pay the claim, the E. Lauer & Sons Company would pay it. It is not contended that this promise was supported by any consideration or was otherwise than a voluntary offer. The letter went in as bearing upon the question as to the ownership of the goods while in storage. When on the witness-stand, Mr. Lauer, president of Lauer & Sons Company, was asked the question: "You understood all the time that these goods were being held for you and all you had to do was to go to the First National Bank and give your check and take the goods; isn't that the fact? A. Sure. Q. That was the way these goods were ordered C. O. D., were they not? A. Yes, sir." We find in the record no explanation of defendant's failure to take up the draft and call for the goods. Witness Lauer testified: "Q. Did you tell them [Smith & Sons Company] that you would not receive the goods for any cause from the time they were shipped to you, and ordered here in Alturas, until after

the fire? A. I do not think we had any correspondence over them at all." He testified that his company ordered the goods shipped through Mr. Laney, a salesman of Smith & Sons Company; that they came C. O. D. as ordered, and that his company had never repudiated the contract.

We find no evidence in the record from which the intention of the parties can be safely determined other than is to be found in the simple fact that the goods were ordered by defendant and that they were shipped to Alturas, C. O. D., as ordered, bill of lading with draft attached, sent to First National Bank, Alturas.

[1] We understand that the rule at common law is the rule in this state, viz., that the risk is placed where the title resides. (*Jue Yee v. Ch. Tetzen & Co.*, 12 Cal. App. 55, [106 Pac. 594]; *Hilmer v. Hills*, 138 Cal. 134, [70 Pac. 1080]; *Seeligson v. Philbrick* (C. C.), 30 Fed. 600.)

It was said in *Seeligson v. Philbrick*, *supra*: "Where a bill of exchange for the price of the goods is inclosed to the buyer for acceptance together with a bill of lading, if he refuse acceptance he acquires no right to the bill of lading, or the goods of which it is the symbol." Where a vendor deals with the bill of lading only to secure the contract price the property rests in the buyer on payment thereof. See Benjamin on Sales, 4th ed., sec. 339, and numerous cases cited." In *Dows v. National Exchange Bank*, 91 U. S. 618, [23 L. Ed. 214, see, also, Rose's U. S. Notes], it was said: "The transmission of the invoice of goods does not pass the property in the goods without an acceptance and payment of the draft drawn against them. An invoice is not a bill of sale, nor is it evidence of a sale. A bill of lading, taken, deliverable to the shipper's own order is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased."

It was held in *Greenwood Grocery Co. v. Canadian County Mill etc. Co.*, 72 S. C. 450, [110 Am. St. Rep. 627, 5 Ann. Cas. 261, 2 L. R. A. (N. S.) 79, 52 S. E. 191], that even if the bill of lading provides for the delivery to the consignee, "yet if the consignor draws for the price attaching the bill of lading to the draft, this is sufficient evidence of his intention to reserve title and right of possession until the draft is paid and the consignee is not entitled to the goods until payment." Unless rebutted by evidence to the contrary, Mr.

Benjamin says the fact of making the bill of lading deliverable to the order of the vendor is almost decisive to show his intention to reserve the *jus disponendi* and prevent the property from passing to the vendee." (Benjamin on Sales, 7th ed., sec. 379.)

In *Hülmer v. Hills*, *supra*, the court quoted with approval from *Sanborn v. Shepherd*, 59 Minn. 144, [60 N. W. 1089], as follows: "There being no agreement of the parties to the contrary, the law presumes the sale to have been made for cash; and, upon a sale for cash, payment of the purchase money and the delivery of the property are concurrent and mutually dependent acts. Neither party is bound to perform without contemporaneous performance by the other. The payment of the purchase money was a condition precedent to plaintiff's right of possession."

[2] We find nothing in *Ramish v. Kirschbraun & Sons*, 107 Cal. 659, [40 Pac. 1045], cited by appellant, controverting the rule above stated. Doubtless the parties may agree that title shall pass to the consignee or the purchaser of the goods upon delivery to the purchaser of the bill of lading with draft attached. The effect of a sale C. O. D. and shipment with bill of lading and draft attached, as shown, may, as Benjamin says, be rebutted by evidence to the contrary intention, as appeared in the cases cited by appellant, but we find no evidence in the record which warrants our holding that Smith & Sons Company intended that title should pass to defendant without first paying for the goods by taking up the draft.

The goods for which judgment was confessed were delivered to defendant and constituted a credit sale and the bill of lading stated "payable thirty days," whereas the bill of lading in question stated "payable C. O. D. draft with B/L First National Bank," and in no sense constituted a credit sale. We think it quite clear that the vendor did not intend that the ownership and right to the possession of the goods should pass to defendant until its draft was paid. We think that the loss of the goods should fall upon plaintiff.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1910. Third Appellate District.—April 17, 1919.]

L. V. MANFORD, Respondent, v. MENIL SINGH,
Appellant.

- [1] **CONSTITUTIONAL LAW—INALIENABLE RIGHTS OF INDIVIDUALS—EFFECT OF PROVISION.**—The phrasing of the inalienable rights of the individual in section 1, article I, of our state constitution effects in no degree an enlargement or abridgment of the civil immunities of the citizen, nor does it operate to limit or increase the authority of the legislative department of the state government.
- [2] **WAGE LAW—CONSTITUTIONALITY AS APPLIED TO INDIVIDUALS.**—The act of May 1, 1911 (Stats. 1911, p. 1268), providing for the payment of wages, and the amendment thereof, approved April 28, 1915 (Stats. 1915, p. 299), is not unconstitutional as applied to natural persons.
- [3] **ID.—DESIGN OF LAW—CONSTRUCTION OF.**—While the design of such wage law is to protect the employee and to promote the welfare of the community, without defeating that purpose it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts.

APPEAL from a judgment of the Superior Court of Glenn County. Wm. M. Finch, Judge. Affirmed.

The facts are stated in the opinion of the court.

Claude F. Purkitt for Appellant.

George R. Freeman for Respondent.

BURNETT, J.—The appeal is on the judgment-roll and involves the construction of "An act providing for the payment of wages," approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof, approved April 28, 1915 (Stats. 1915, p. 299). The question was carefully considered by this court in *Moore v. Indian Spring Channel Gold Min. Co.*, 37 Cal. App. 370, [174 Pac. 378], and the legislation was upheld as within the constitutional authority of the law-making power. Therein many decisions are reviewed, and the reasons justifying such legislation are clearly stated. Our faith in the legal soundness of that decision has not been shaken, and its authority is of controlling force in the instant case.

Appellant, however, contends that a distinction exists between a corporation and a natural person as to the operation of the law, which was not urged or considered in the Moore case, and that while the statute may be and is valid as to the former, it must fail when challenged by an individual as violative of his fundamental rights expressed in section 1, article I, of our state constitution as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness," and also section 13 of said article: ". . . nor be deprived of life, liberty, or property without due process of law." It is claimed that due consideration of these primary maxims in connection with the fourteenth amendment to the federal constitution will furnish protection to the individual employer against the application of the drastic penalty of said law. [1] It is manifest, though, that as far as any substantial right or privilege of the citizen is concerned and the protection which must be accorded to it by the law, said provision of the state constitution prescribes nothing that is not comprehended by said section of the federal constitution. Of course, the sonorous phrasing of the inalienable rights of the individual in said section is felicitous and impressive, but it effects in no degree an enlargement or abridgment of the civil immunities of the citizen, nor does it operate to limit or increase the authority of the legislative department of the state government. And said section 13 is manifestly in scope and purpose identical with said provision of the federal constitution. It may be said, therefore, that the principle of constitutional law invoked by appellant was the subject of earnest attention in the Moore case, *supra*.

In support of his contention that such legislation may be upheld as against a corporation but not against an individual, appellant cites the case of *Leep v. St. Louis etc. R. Co.*, 58 Ark. 407, [41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75], wherein the supreme court of Arkansas held that such legislation was valid as to a corporation by reason of the fact that under the act or charter of incorporation there was reserved the power in the legislature to amend the corporate charter. It was concluded that in the case of a railroad company the legislature in its wisdom, finding that "better servants and

service could be secured by the prompt payment of their wages on the termination of their employment," and that thereby the legitimate purpose of the corporation would be promoted, might require the company to pay its employees at the termination of their employment, although such legislation might interfere with contracts purely and exclusively private. As against the railroad corporation, the statute involved in that case was upheld for the reason stated, while it was declared to be unconstitutional as applied to the individual for the reason that it was an unwarranted interference with the constitutional right to make contracts.

The opinion discusses interestingly and persuasively the essential principles involved in such inquiry, and it is well worth careful consideration, although, manifestly, it is not of authority here. Moreover, there is to be said of the decision, that the discussion as to the effect of the law upon natural persons was somewhat gratuitous, since the action was against a corporation solely. Besides, the statute therein construed differed materially from our law on the subject in that it penalized the employer for discharging the employee either *with* or *without cause* and by implication at least it denied the employer the ordinary defenses for the misconduct of the employee or his failure to comply with the terms of his contract. Under the peculiar terms of the statute of Arkansas it would not be surprising if the supreme court had declared it to be invalid even as against a corporation.

[2] But appellant concedes that our statute is within the sanction of the constitution if it can be reasonably held that the prompt payment of employee's wages is a matter that affects the public generally and is within the police power of the legislature. That suggests the very reason why such legislation is permissible, imposing, as it does, a certain limitation upon the right to contract.

This consideration is fully set forth in the Moore decision, *supra*, and there is no necessity for further specific attention to it.

[3] We may add that, manifestly, the statute should have reasonable construction. Its design is to protect the employee and to promote the welfare of the community. Without defeating that purpose it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts. But it is to be observed that the most formidable

objection to the statute derives its principal force from the supposed hardships of a hypothetical case wherein the employer is without fault or the employee is guilty of culpable conduct. The statute is not subject to such reproach. It contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim. Indeed, the fullest right to contract as to payment is but slightly restricted and an employer can easily provide in advance for the contingencies that may arise under the statute. If he refuses to pay what is due as therein provided, it is not unjust that he should be subjected to a penalty.

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2760. First Appellate District, Division Two.—April 18, 1919.]

BAKERSFIELD IMPROVEMENT COMPANY (a Corporation), Respondent, v. **BAKERSFIELD THEATER COMPANY** (a Corporation) et al., Defendants; **IRVING C. ACKERMAN**, Appellant.

- [1] **PLEADING—ACTION UPON JOINT AND SEVERAL LIABILITY—RIGHT TO PROCEED AGAINST CERTAIN DEFENDANTS ONLY—JUDGMENT.**—In an action prosecuted against several defendants upon their joint and several liability, the plaintiff may, under section 414 of the Code of Civil Procedure, proceed against such of the defendants as have been served with process as if they were the only defendants, and the court may render a several judgment against any defendant therein without regard to the liability of any other defendant.
- [2] **LANDLORD AND TENANT—BOND GUARANTEEING PAYMENT OF RENT—TIME FOR GIVING—EXTENSION BY LESSOR.**—A provision in a lease requiring a bond guaranteeing payment of the rent thereunder to be executed on or before a given date is clearly for the benefit of the lessor; therefore, the time for the giving of such bond may be extended by the lessor.
- [3] **ID.—OPTION OF LESSOR TO REQUIRE BOND—TIME WITHIN WHICH TO BE EXERCISED—EXTENSION—WAIVER.**—Where the lease does not

provide at what date the option of the lessor to make the giving of the bond a condition precedent to the taking effect of the lease must be exercised, it will be presumed that it is to be exercised within a reasonable time. The lessor might be indulgent with the lessee in the matter of extending his time without waiving the option secured to it under the lease.

- [4] **ID.—TIME OF TAKING EFFECT OF LEASE — EFFECT OF CONDITIONS PRECEDENT.**—Provisions in a lease that the execution of a bond guaranteeing the payment of the rent and that the expenditure of a certain sum of money by the lessee upon the premises for lights, display signs, etc., shall at the option of the lessor be conditions precedent to the lease taking effect, indicate that the parties do not intend the lease to take effect at the time it is signed. A condition precedent is one which must be performed in order to have any rights vest.
- [5] **ID.—AGREEMENT TO EXECUTE BOND—EFFECT OF SUBSEQUENT PROVISION.**—Where a lease provides that the lessee will execute and deliver to the lessor on or before a given date a good and sufficient undertaking, in a specified sum, conditioned for the payment of the rent therein reserved, a subsequent provision that “the executing and delivery of said bond” shall at the option of the lessor “be a condition precedent to this lease taking effect” will neither limit nor enlarge the rights of the lessor or the lessee.
- [6] **ID.—SUBSEQUENT EXECUTION OF BOND—EFFECT—CONSIDERATION.**—In such case, where a bond, though executed subsequent to the time originally contemplated, is the one originally provided for, it relates back to and takes effect in pursuance of the original agreement and is supported by the original consideration.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge. Affirmed.

The facts are stated in the opinion of the court.

Leon E. Morris for Appellant.

Purcell Rowe for Respondent.

LANGDON, P. J.—This is an appeal by the defendant, Irving C. Ackerman, from a judgment in favor of the plaintiff in the sum of three thousand dollars against him and the defendant, F. A. Giese, as sureties for the payment of rent under a lease in which the defendant corporation was the lessee.

[1] Appellant contends, first, that as the corporation defendant was never served with summons and did not appear, the action was never at issue and a trial was improper. The action was prosecuted against the several defendants upon their joint and several liability. Section 414 of the Code of Civil Procedure applies to such a situation and provides that when summons is served on one or more, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. Where there is a several liability, the court has a right to render a several judgment against any defendant without regard to the liability of any other defendant. (*Anderson v. Nawa*, 25 Cal. App. 151, 156, 157, [143 Pac. 555].)

The appellant next presents the argument that the bond was given without consideration, and relies for this contention upon the following facts: The lease between the plaintiff and the corporation defendant was dated August 7, 1913. It provided that a bond should be executed on or before January 1, 1914, guaranteeing the payment of the rent thereunder. The term of the lease was not to begin until July 1, 1914. It was provided in the lease that the execution and delivery of the bond should, at the option of the lessor, be a condition precedent to the taking effect of the lease. The bond was not executed on January 1st. The bond in suit, in accordance with the requirements of the lease and in terms referring to the lease and guaranteeing its performance, was executed on March 27, 1914. The appellant insists that as the bond was not executed contemporaneously with the lease, it required an independent consideration. Counsel for appellant admits that under the rule laid down in the case of *Stroud v. Thomas*, 139 Cal. 275, [96 Am. St. Rep. 111, 72 Pac. 1008], the execution of the lease would furnish a good consideration for the bond, even though they were not executed contemporaneously, where the lease itself, as in this case, provides for the execution of the bond at some future time. In order, however, to escape the operation of this rule, counsel urges that there was a special time limit placed upon the lessee within which to give the bond, and that if it was not executed within that time, the privilege of exacting the bond came to an end, and the lessor was compelled either to avoid the lease under its option, or to permit it to become effective without the giving of the bond. And this places counsel in a position where he

must insist—as indeed he does—that the lessor could not enlarge the time for the giving of the bond—and could not indulge the lessee in further time without sacrificing his substantial rights. [2] The provision requiring a bond was clearly for the benefit of the lessor; the lessee was not to be given possession under the lease until six months after the time originally provided for the giving of the bond, and we know of no rule of law which would prevent the lessor from extending the time for the giving of the bond. It appears this was what was done in the present case. Under the lease, the Bakersfield Theater Company went into possession of the premises on July 1, 1914, the bond guaranteeing the payment of the rent having been executed and delivered prior thereto, to wit, March 27, 1914. This was the bond required by the lease and the consideration therefor was the execution and delivery of the lease. While it is true that the lease provides that the bond shall be given on or before January 1, 1914, time was not made of the essence of the contract, and the lease does not provide at what date the option of the lessor to make the giving of the bond a condition precedent to the taking effect of the lease must be exercised. [3] No time being provided within which this option might be exercised, it will be presumed that it was to be exercised within a reasonable time. Therefore, it would seem that the lessor might be indulgent with the lessee in the matter of extending his time without waiving the option reserved to the lessor. The trial court found that the bond was executed and delivered for a good and valuable consideration, to wit, the execution and delivery of the lease, and that the plaintiff did not, prior to the execution and delivery of the bond to it, waive any of its rights or any option secured to it under said lease; and that said lease did not become binding and effective as an agreement between the parties until the execution and delivery of the bond. We think these findings are sustained by the evidence.

[4] Furthermore, and approaching the matter from another angle: It appears to us from an examination of the entire lease that the lease was never intended by the parties to go into effect until the various conditions precedent provided therein had either been fulfilled by the lessee or waived by the lessor. There was no oral evidence offered in the trial court, and we have before us for consideration merely the

written instruments involved in the controversy. The lease provides that the execution of the bond shall be a condition precedent, at the option of the lessor, to the lease taking effect. It also provides that the expenditure of a certain sum of money by the lessee upon the premises for lights, display signs, etc., shall at the option of the lessor be a condition precedent to the lease taking effect. These provisions indicate to our minds that the parties did not intend the lease to go into effect at the time it was signed. A condition precedent is one which must be performed in order to have any rights vest. The lease then did not go into effect, and the lessee had no rights in the premises until all conditions precedent to be performed by it had been performed or waived. The condition in the lease regarding the bond is as follows:

"It is further agreed that the second party will execute and deliver to the first party on or before the 1st day of January, 1914, a good and sufficient undertaking with two or more sureties satisfactory to the first party in the sum of three thousand dollars, conditioned for the payment of the rent hereinbefore reserved, and for the performance of the other covenants in this lease specified to be performed by said second party."

[5] However, the appellant contends that the words which follow the above-quoted condition, and which read: "The executing and delivery of said bond as is herein provided for, shall at the option of the first party be a condition precedent to this lease taking effect," limit and restrict the rights of the lessor in some way so as to put upon said lessor the duty of taking some affirmative action, failing in which he must give up the right to insist upon the condition. We think that this last-quoted sentence neither limited nor enlarged the rights of the lessor or the lessee, for even without the express stipulation that this agreement should be a condition precedent—such an agreement to provide security for the payment of the rent stipulated in the lease is a condition and not a covenant. (*Knight v. Black*, 19 Cal. App. 518, [126 Pac. 512].) "There is a decided distinction between the creation and effect of a condition and a covenant. . . . A breach of a condition upon which an estate is granted works a forfeiture of the estate, while a breach of a covenant is merely ground for a recovery in damages." (*Knight v. Black*, *supra*.) In view of the right given by the law to insist upon the perform-

ance of the condition, and in view of the further right given by the law to the lessor to waive this condition if he so desired, this sentence expresses nothing more than what the law would imply, viz., that the lessor might insist upon the performance of the condition, but that he might waive that condition if he wished. This being true, the burden is upon the defendant and appellant here to show such waiver. He has not shown it. On the contrary, it appears that the defendant executed and delivered a bond to secure the payment of the rent to become due under the lease and that the lease went into effect at the commencement of the term thereof. [6] This bond is the one originally provided for, and has the same force and effect as if given at the time originally contemplated by the parties. This being true, the bond relates back to and takes effect in pursuance of the original agreement, and is supported by the original consideration. (*Stroud v. Thomas*, 139 Cal. 274, [96 Am. St. Rep. 111, 72 Pac. 1008].)

The judgment is affirmed.

Haven, J., and Brittain, J., concurred.

[Civ. No. 2750. First Appellate District, Division Two.—April 18, 1919.]

PACIFIC MANUFACTURING COMPANY (a Corporation), et al., Respondents, v. R. A. PERRY et al., Appellants.

- [1] **MECHANICS' LIENS—ABANDONMENT OF CONTRACT—VALUE OF WORK PERFORMED—SUFFICIENCY OF FINDINGS.**—In an action to foreclose contractors' and materialmen's liens, under section 1200 of the Code of Civil Procedure, prior to its repeal in 1911, a finding, "that the value of the work and materials already done and furnished at the time of the abandonment of said work and contract" by the contractor, "including materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, exclusive of the extra work," was a certain aggregate sum, being a given per cent of the contract price, "on account of which there had been paid the contractor" at the time of the abandonment a stated sum, followed by a finding as to the reasonable value of the extra work performed under authorization from

the owners, the amount paid on account thereof, and the balance due therefor, was a sufficient finding of fact.

- [2] **ID.—RIGHT TO ABANDON CONTRACT — PAYMENT OF LIENS — PROPORTION OF CONTRACT PRICE APPLICABLE.**—Section 1200 of the Code of Civil Procedure, as it existed prior to its repeal, recognized that a building contract might be terminated by abandonment, and provided a method of arriving at the proportion of the contract price applicable to liens in that event. Under it, upon abandonment, the performance of the contract came to an end, and the rights of all parties thereunder were to be adjusted as of that date.
- [3] **ID.—AMOUNT APPLICABLE TO PAYMENT OF LIENS—PROPER FINDING.** In such action the court, having found that at the time of the abandonment the contract had been a given per cent completed, properly held that that per cent of the contract price, less payments made, was applicable to the discharge of liens which had accrued prior to the abandonment. The *actual* cost of completing the building was immaterial.
- [4] **ID.—ACTION TO FORECLOSE LIEN—JUDGMENT-ROLL IN ANOTHER ACTION NOT ADMISSIBLE.**—In such action the court properly sustained an objection to the admission in evidence of the judgment-roll in another action by the same plaintiff against the defendant contractor, wherein the plaintiff had recovered a judgment, which on execution issued thereon was satisfied, where there was an entire absence of evidence connecting the subject matter of the former action with that in the suit before the court.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge. Affirmed.

The facts are stated in the opinion of the court.

C. Irving Wright, F. E. Boland and John Douglas Short for Appellants.

W. B. Rinehart for Respondents.

HAVEN, J.—This is the second appeal in consolidated actions to foreclose contractors' and materialmen's liens, the opinion on the first appeal being reported in 31 Cal. App. 274, [160 Pac. 246]. On June 10, 1910, the defendant R. A. Perry, acting on behalf of the defendant Winifred A. Perry, his wife, entered into a valid contract with defendant Magneson for the construction of a residence and garage for the total contract price of \$23,567, which contract was re-

corded on June 13, 1910. The contractor commenced construction of the building thereunder and continued until February 11, 1911, at which latter date he abandoned work under the contract. On March 22, 1911, the defendants R. A. and Winifred A. Perry filed for record a notice of abandonment by the contractor of said contract. The details of the contract, so far as they may be material, are set forth in the opinion on the former appeal and need not here be repeated. The present appeal is by the defendants from a decree adjudging plaintiffs entitled to liens as set forth in their several complaints and decreeing the foreclosure thereof. All the claims of lien here involved are based upon work performed or materials furnished prior to the abandonment of the contract. The controversy is concerned mainly with the proper portion of the contract price applicable to the payment of such liens under section 1200 of the Code of Civil Procedure, prior to its repeal in 1911; and particularly as to the correct method of computation to be adopted in arriving at that amount. The court found: "That the value of the work and materials already done and furnished at the time of the abandonment of said work and contract by the said defendant Magneson, as aforesaid, to wit, on the eleventh day of February, 1911, including materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, exclusive of the extra work hereinafter mentioned and referred to, was and is the aggregate sum of \$17,468.71, being 74.2 per cent of the amount of the contract price, to wit, \$23,567, on account of which there had been paid the contractor, the defendant Magneson, at the time of abandonment, the sum of ten thousand dollars." The court also found that during the course of construction of the buildings, and prior to the abandonment of the contract, certain extra work was performed by the contractor, subcontractors, and materialmen, under authorization in writing from the defendants Perry and in conformance with the provisions of the contract, the reasonable value of which aggregated \$4,016.36, on account of which there had been paid to the contractor the sum of \$1,300, leaving a balance unpaid for said extras in the sum of \$2,716.36.

[1] Appellants attack the finding above quoted as not being a sufficient finding of fact under the terms of section

1200 of the Code of Civil Procedure. It is couched, however, in the language of that section, and is sufficient under the authority of *Marshall v. Vallejo Commercial Bank*, 163 Cal. 469, 474, [126 Pac. 146]. The ultimate fact is found as required by the section referred to. The real contention of appellants is that this finding is not supported by the evidence, for the reason that it does not appear that the cost of completion of the building was an element taken into consideration in arriving at the amount found to be applicable to the payment of liens at the time of abandonment. Appellants argue that the cost of completion after abandonment was much greater than it would have been if there had been no abandonment, and as the owners were obliged to pay this extra cost through no fault on their part, it should have been taken into consideration in arriving at the amount applicable to claims of lien which accrued prior to abandonment.

[2] It is admitted by appellants that this contention is contrary to the rule laid down in *Ganahl Lumber Co. v. Weinsveig*, 168 Cal. 664, 669, [124 Pac. 1025]. But it is claimed that the rule announced in the case last referred to is contrary to all the previous decisions of the supreme court, and to the law of these cases as announced upon the former appeal. Particular reliance is placed by appellants upon the cases of *Roystone Co. v. Darling*, 171 Cal. 526, 533, [154 Pac. 15], *McDonald v. Hayes*, 132 Cal. 490, [64 Pac. 850], *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, [97 Pac. 152], and *Marshall v. Vallejo Commercial Bank*, 163 Cal. 469, [126 Pac. 146], as announcing a rule which is inconsistent with that declared in the *Ganahl* case, as construed and applied on the former appeal, and by the trial court in the instant cases. Upon a careful reading of the decisions referred to, we do not find the inconsistency claimed by appellants. In our opinion, the confusion of appellants arises from a failure fully to appreciate the fact, so clearly pointed out in the *Ganahl* case, that upon abandonment the performance of the contract has come to an end, and the rights of all parties thereunder must be adjusted as of that date. It is true that a contract legally made limits the liability of the owner to lien claimants to the amount of the contract price; but the liability thus referred to is to lien claimants whose claims have arisen under the contract. Section 1200 of the Code of Civil

Procedure, as it existed prior to its repeal, recognized that a building contract might be terminated by abandonment, and provided a method of arriving at the proportion of the contract price applicable to liens in that event. As stated in the Ganahl case, if the contract is half performed, it is equitable, and a protection of the constitutional rights of all parties, to decree that one-half of the price agreed to be paid for the performance of the entire contract, less payments made, should be applied to the discharge of liens which had accrued prior to the abandonment. This is undoubtedly the rule established by the decision last above referred to, and even if it could be construed as inconsistent with former decisions, as claimed by appellants, we should consider ourselves bound thereby. We are of the opinion, however, that all the cases referred to are entirely harmonious.

[3] The testimony was conflicting as to the value of the work done and materials furnished at the time of abandonment, and as to the reasonable value of all the labor and materials necessary to construct and complete the buildings according to the contract, plans, and specifications. The findings of the court are sufficiently supported, however, by the evidence of experts offered on behalf of the plaintiffs. These witnesses testified that the reasonable value, at the time the buildings were constructed, of all the labor and materials necessary and required to construct and complete the buildings according to the contract, plans, and specifications was the aggregate sum of \$26,255.08; and that the aggregate value of the labor and materials actually used in the construction of the buildings and upon the ground at the time of the abandonment was \$19,454.34. They then computed that the latter sum was 74.2 per cent of the former, and, therefore, testified that the contract had been 74.2 per cent completed at the time of the abandonment. Upon this testimony the court held that 74.2 per cent of the contract price, less payments made, was applicable to the discharge of liens which had accrued prior to the abandonment. In our opinion, this method of computation follows the rule announced in the Ganahl case and is justified thereby.

It is further claimed by appellants that a different rule is announced in the opinion rendered upon the former appeal in these cases, and that that opinion has become the law of these cases, even if it should be found to be inconsistent with the

decisions of the supreme court. The court there held that it was "unable to formulate any equation under the rule of section 1200 as approved by the supreme and appellate courts, which would support the findings of the court for the full amount found subject to the liens, on the theory of a valid contract abandoned by the contractor." It is pointed out by the writer of that opinion that the amount for which the court gave judgment on the first trial exceeded the amount of the fund available for the discharge of liens, computed upon respondents' own theory, by \$674.59. It was doubtless this discrepancy which made it impossible for the appellate court to formulate an equation which would support the findings of the court for the full amount found subject to liens, and led to a reversal of the first judgment. A careful reading of the entire opinion does not disclose any conflict with the rule above referred to. Special reference is made therein to the decision in the *Ganahl* case, and it is stated that the meaning of section 1200 of the Code of Civil Procedure, as affecting the liability of the owner in the case of an abandonment of a valid contract, is very clearly pointed out in the case referred to. Appellants rely upon the following language in the former opinion: "But respondent makes no allowance for the cost of completing the buildings which, through no fault of appellants, were left in an unfinished condition. What the actual cost of completion was to appellants may be immaterial (*Ganahl Lumber Co. v. Weinsveig, supra*), but as was said in *Hoffman-Marks Co. v. Spires*, 154 Cal. 111, 116, [97 Pac. 152]: 'When he [owner] is, without any default on his part, burdened with the cost of completing the building, it is but fair and just that he should be relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. In no other way can he be protected in his constitutional right to have his liability limited to the amount which, by a valid contract, he has agreed to pay.' " There can be no claim in the instant cases that the owner has not been relieved of the obligation of paying to the original contractor, or those claiming under him, so much of the contract price as corresponds to the portion of the work left undone. As we understand the portion of the opinion above quoted, it means merely that, while the actual

cost of such completion to appellants may be immaterial, the reasonable cost thereof, according to the plans and specifications, must be taken into consideration in arriving at the proper proportion of the contract which had been completed at the time of abandonment, and the proportion of the contract price applicable to liens at that time. Appellants' contention is that the *actual* cost of completion to the defendants should have been taken into consideration in arriving at the figures above referred to. This is contrary to the rule laid down in the Ganahl case, and it is so stated in the portion of the opinion on the former appeal above quoted. We think, therefore, that the trial court was correct in construing the opinion on the former appeal in these cases as not being inconsistent with the rule laid down in the Ganahl case.

[4] Objection is made by appellants to the allowance of the lien of the Pacific Manufacturing Company on account of a claimed error of the trial court in sustaining an objection to the offer in evidence by defendants of the judgment-roll in another action by the same plaintiff against O. M. Magnuson, the contractor herein, in which a judgment was recovered for \$2,567.59 and execution issued thereon. Attached to the sheriff's return on such execution was a receipt signed by plaintiff's attorney in the sum of \$2,611.45. Defendants sought to prove by this record that the claim here sued upon had been paid, but the record offered did not show that the indebtedness there sued upon is the same indebtedness as is involved in the present suit. Defendants offered no evidence to that effect. They now rely upon the concurring opinion of Mr. Justice McKee in *Goss v. Strelitz*, 54 Cal. 640, 644, as establishing the rule that any payment from the contractor to the Pacific Manufacturing Company should be applied in payment of the lien involved in this action, in the absence of any showing of other existing indebtedness. In the case referred to the payment which was applied was received from the contractor on account of bricks furnished for the particular contract. If there had been evidence here that the payment collected through the action referred to was so received on account of this particular contract, the authority would be applicable. Inasmuch, however, as there is an entire absence of any evidence connecting the payment referred to in the receipt mentioned with the claim sued upon in this

action, the trial court did not err in sustaining plaintiffs' objection to the offer of the judgment-roll.

The judgment appealed from is affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 16, 1919.

All the Justices concurred.

[Civ. No. 2800. Second Appellate District, Division One.—April 18, 1919.]

THE PEOPLE ex rel. **CITY OF PASADENA** et al.,
Appellants, v. **CITY OF MONTEREY PARK**, etc.,
et al., Respondents.

- [1] **MUNICIPAL CORPORATIONS — ANNEXATION PROCEEDINGS — ORGANIZATION OF CITY—OVERLAPPING OF TERRITORY—JURISDICTION OF SUPERVISORS.**—After a valid petition for annexation, pursuant to the Annexation Act of 1913, is received and acted upon by the commission of the city to which the territory is proposed to be annexed and an annexation election is called, the board of supervisors of the county have no jurisdiction to entertain and act upon a petition calling for proceedings to organize a city including a part of the same territory while the annexation proceedings are pending.
- [2] **ID.—CONSTRUCTION OF SECTION 7 OF ANNEXATION ACT—SCOPE OF ACT.**—Section 7 of the Annexation Act of 1913, as amended in 1915, is merely declaratory of existing law, and was intended to declare and place beyond doubt the disability of one city to annex territory during the pendency of proceedings by another city to annex the same territory, and was not enacted as a limitation of the jurisdiction of the municipality first acting in the matter. The creation of a new and separate municipal corporation through the action of the county authorities and including the territory proposed to be annexed is not a part of the subject matter of the Annexation Act.
- [3] **ID.—CASE AT BAR — IMPROPER CLASSIFICATION OF TERRITORY.**—In this action the petition for annexation showed that the proceedings were on their face an attempt by the flimsiest subterfuge to treat as inhabited various uninhabited tracts of land, and to annex them

under the proceedings prescribed by a statute which applies solely to annexation of inhabited territory.

- [4] ID.—STATUS OF TERRITORY—DECISION OF COMMISSION NOT FINAL.—Assuming that the question whether or not all the territory included in an annexation petition is inhabited is regularly submitted to and decided by the commission of the city to which such territory is sought to be annexed, such decision is not final where the annexation petition “on its face” is not sufficient.
- [5] ID.—ANNEXATION PROCEEDINGS INVALID — JURISDICTION OF SUPERVISORS TO ENTERTAIN INCORPORATION PROCEEDINGS.—Where, as in this case, there is in fact no valid pending annexation proceeding in existence at the time affecting any of the territory included in the proceedings for the incorporation of the new city, the board of supervisors is authorized to receive and act upon a petition for such incorporation.

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge. Affirmed.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, John Munger, City Attorney of Pasadena, William Hazlett, City Attorney of South Pasadena, Alfred Barstow, City Attorney of Alhambra, and Rohe & Jeffers for Appellants.

Thomas A. Berkebile for Respondents.

CONREY, P. J.—This is an action in the nature of *quo warranto* in which the plaintiffs challenge the right of the defendants to exercise the franchise of a city and its respective offices. The plaintiffs claim that by virtue of certain proceedings begun on the seventeenth day of April, 1916, and completed on the fourteenth day of August, 1916, certain territory was annexed to and became a part of the city of Alhambra. Defendants claim that by proceedings begun on the eighth day of May, 1916, and completed on the twenty-ninth day of May, 1916, the city of Monterey Park became a municipal corporation of the sixth class. The alleged city includes territory which was a part of the territory included in the annexation proceedings. The annexation proceedings were conducted under the Annexation Act of 1913, [Stats. 1913, p. 587], and the incorporation proceedings were conducted under the Municipal Corporations Act of 1883, [Stats.

1883, p. 93]. Both of the proceedings in question were conducted according to the regular forms of procedure provided by the respective statutes.

[1]. The first proposition urged by appellants is that, since the petition for annexation was received and acted upon by the commission of the city of Alhambra and an annexation election had been called prior to the commencement of the proceedings for the organization of the city of Monterey Park, the board of supervisors of Los Angeles County did not have jurisdiction to entertain and act upon a petition calling for proceedings to organize a city including a part of the same territory while the annexation proceedings were pending. In considering this contention let it be assumed that valid annexation proceedings were pending at the time when the incorporation proceedings of defendant city were commenced. The question involved does not appear to have been passed upon by the courts of this state. The only decisions referred to in the briefs are those cited by appellants, and they all sustain the proposition stated. Especially in point are *People v. Morrow*, 181 Ill. 315, [54 N. E. 839]; *Taylor v. City of Ft. Wayne*, 47 Ind. 274; *Independent District of Shelton v. Board of Supervisors*, 51 Iowa, 658, [2 N. W. 590]. The Illinois decision contains a statement of the other two cases, and the court said: "As between courts of co-ordinate jurisdiction, the tribunal first acquiring jurisdiction retains it, and is not to be interfered with by another co-ordinate court. The reason of the rule is that otherwise confusion and conflict would arise. Here power is given over the same territory to two parties authorized to act,—one a city council or board of trustees, who may attach it to a municipality to which it is adjacent; the other, a majority of the legal voters within its boundary, who may organize it into a village." Further along it is said: "It cannot, we think, be presumed that the legislature intended to give citizens and legal voters of certain territory the power to organize a village, and at the same time authorize other parties, by a subsequent proceeding, to defeat that right; and it is clear that to hold otherwise would be to bring into conflict, resulting in confusion, the two opposing powers, or, speaking in a general sense, jurisdictions. Had the petition for annexation been first presented to the city council, and its action postponed from time to time, until, by a subsequent proceeding, the organization of

the territory into a village had been perfected, the same question would be presented, and we do not think in that case it could reasonably be held that the power of the city council to carry out the annexation proceeding would be defeated. The question, as it arises under our statute and decisions, is a new one, and not wholly free from difficulty, but we think the foregoing views are sustained by both reason and authority."

Respondents endeavor to break the force of these decisions in two ways. First, they say that the rule to the effect that when courts have concurrent jurisdiction of the same subject matter the first that assumes jurisdiction excludes the other, does not apply unless the parties are the same or stand in privity to each other and the points in litigation or the redress sought in both courts are identical. They insist that in each of the three cases above mentioned the territory over which the two municipalities sought to acquire jurisdiction was identical, whereas in the case at bar it is not identical, and that this fact creates an exception which takes the case out of the general rule. Reference to the decisions above cited, however, shows that the territory involved in the respective opposing proceedings was not identical, except in the Illinois case. Nor do we think that the fact that one proceeding includes some territory not included in the other is alone sufficient to take the case out of the rule.

[2] The other contention urged by respondents in opposition to the proposition stated is based upon the provisions of section 7 of the Annexation Act of 1913, as amended in 1915. (Stats. 1915, p. 309.) That section deals with the exclusiveness of annexation proceedings first instituted by one city as against annexation proceedings affecting the same territory and instituted by another city while the first proceedings remain pending. As to a controversy arising out of such conflicting annexation proceedings, the statute speaks unnecessarily, if the unwritten law relied upon by appellants, and to which we have already referred, would be applicable to such a case. We are satisfied that it would so apply and that section 7 is merely declaratory of existing law. Respondents argue, however, that by reason of the enactment of section 7 the legislature sought to fix and limit the jurisdiction of a municipality attempting to annex under that act, and that it should be presumed that the legislature expressed

all it intended to express and granted all jurisdiction that it intended to grant to municipalities annexing thereunder. They say that the legal maxim applies, "*expressio unius est exclusio alterius*." We think, however, that section 7 was intended to declare and place beyond doubt the disability of one city to annex territory during the pendency of proceedings by another city to annex the same territory, and was not enacted as a limitation of the jurisdiction of the municipality first acting in the matter. The creation of a new and separate municipal corporation through the action of the county authorities and including the territory proposed to be annexed is not a part of the subject matter of said section 7. That section and the entire act in which it is included dealt solely with the subject of annexations and not with the original creation of municipal corporations.

We come now to the question whether, as contended by respondents, the annexation proceedings were in fact void. The territory included in the annexation proceedings was in those proceedings treated as one tract of inhabited territory adjoining the city of Alhambra. Its real character was that of a series of parcels of land. This is made manifest by analysis of the description, and is exhibited to the eye by inspection of defendants' exhibit "A," which is shown in the transcript. The entire territory contains 661.82 acres, far the greater part of which is, and at all times herein mentioned was, a tract of land belonging to the relators, situated nearly two miles south of the south boundary of the city of Alhambra, as that city was constituted on the seventeenth day of April, 1916. For convenience, this tract is in the record called "new sewer farm." The remainder of the annexation territory consists of (1) three narrow strips (nowhere more than three hundred feet wide), which run around the north, the east and the south sides of a tract of land designated in the record as "old sewer farm," which belongs to the city of Pasadena and is located immediately east of the city of Alhambra; (2) five strips of land connecting the three above-mentioned strips with the new sewer farm. These five strips consist of (a) a parcel thirty feet wide, being the south half of that part of Hellman Avenue; (b) a parcel seventy feet wide, being the entire width of Garfield Avenue; (c) a parcel sixty feet wide, being the entire width of Newmark Avenue;

(d) a parcel seventy feet wide, being the entire width of Ramona Avenue; (e) a parcel fifty feet wide and approximately one mile in length, extending southwesterly from Ramona Avenue to the new sewer farm. The only inhabitants of the annexation territory were eight persons who lived in three houses, all of which were situated on one acre on the strip lying east of the old sewer farm, at a point 3.54 miles from the north limits of the new sewer farm. The highways included in the annexation territory extend through a thickly populated section of Monterey Park, and the lines of annexation were so drawn that they exclude thirty-one electors, thirty-eight homes, and ninety-three inhabitants living along and adjacent to said highways. Also the lines were so drawn that the ranch house and inhabitants thereof on the new sewer farm were eliminated from the annexation territory, as was also a power station and cottage located on an adjacent corner to the new sewer farm. These lines of exclusion made indentations into the area which naturally was a part of the same territory with the new sewer farm. The result of these exclusions was that all of the tracts involved in the annexation territory were uninhabited, except the tract on which said eight persons lived. These eight persons were all employees working on the old sewer farm, and they were the sole signers of the petition by which the annexation proceedings were instituted.

[3] On these facts it is too plain to admit any doubt that the annexation proceedings were on their face an attempt by the flimsiest subterfuge to treat as inhabited various uninhabited tracts of land, and to annex them to the city of Alhambra under the form of proceedings prescribed by a statute which applies solely to annexation of inhabited territory. It is likewise clear that such proceedings were a palpable fraud upon the inhabitants of the community through whose lands the cord of connection was run from the land adjoining Alhambra to the limits of the new sewer farm. The annexation petition showed on its face that several of the parcels included were public highways and that therefore they could not be inhabited territory.

"It is not disputed that there are in force in California three separate statutes under which annexations of territory to municipalities may be made: Act of 1889 (Stats. 1889,

p. 358), of 1899 (Stats. 1899, p. 37), and of 1913 (Stats. 1913, p. 587). The distinctive features of these acts, as far as germane to the present consideration and pointed out by respondents, are as follows: (1) Act of 1889 for annexation of inhabited territory upon petition of electors of existing city; (2) act of 1899 for annexation of uninhabited territory; (3) act of 1913 for annexation of inhabited territory upon petition of electors in territory proposed to be annexed, which territory may be either (a) one body (sections 2 to 4), or (b) two or more bodies, which must be submitted as separate propositions (section 6)." (*People v. City of Lemoore*, 37 Cal. App. 79, [174 Pac. 93].)

People v. Town of Ontario, 148 Cal. 625, [84 Pac. 205], was an action to determine the validity of municipal annexation proceedings. The original city area was in the form of a square. The proposed annexation was of a broad band of territory completely surrounding the city. It was claimed that some of the included parcels of land were uninhabited, and therefore could not be annexed except by proceedings under the act of 1899. In response to this claim, the court (page 641) said: "Upon this branch of the case, a full consideration of the acts of the legislature satisfies us that the act of 1899 was never designed to in any way affect any of the provisions of the act of 1889, so far as territory which, taken as a whole, may fairly be said to be inhabited territory is concerned, and the evidence in the case at bar was such as to sustain the conclusion of the court below to the effect that the territory here annexed was of that character, notwithstanding the presence of several uninhabited tracts or parcels, each exceeding five acres in area. If the 'territory' proposed to be annexed, regarded as a whole, may fairly be said to be inhabited, the proceedings must be had under the act of 1889, regardless of the number of parcels of land included therein that are uninhabited. Any other construction of the act of 1899 would materially affect the act of 1889, which, it is clearly indicated, was never intended. It is expressly provided in section 5 of the act of 1889 [1899] that 'nothing in this act shall be deemed to repeal the provisions of any act now providing for the annexation of inhabited territory.'" There may be cases wherein it would be difficult to pass upon the question whether a described territory "regarded as a

whole, may fairly be said to be inhabited," and wherein, therefore, a court would not readily disregard the action of municipal authorities in such proceedings. But in the case at bar the fact that several distinct portions of the territory were uninhabited is not only admitted, but, as we have shown, necessarily appears from the description contained in the annexation petition, which description is repeated in the subsequent resolution, ordinance, notices of election, and certificate, by means of which the annexation proceedings were conducted and completed.

Appellants contend that the defense based upon the invalidity of the annexation proceedings cannot be maintained, because such defense comes by way of collateral attack in a *quo warranto* case. They say that *quo warranto* is not a proceeding wherein the court may inquire into the question whether the commission of the city of Alhambra did or did not wholly and fairly and completely do and determine everything necessary to be determined when they granted the petition for annexation and annexed the territory in question. They rely upon *People v. Town of Ontario*, 148 Cal. 625, [84 Pac. 205], where it was held that in a *quo warranto* proceeding the determination of the city board of trustees affirming the genuineness and numerical sufficiency of the signatures to the petition would not be inquired into in such proceeding, and that the findings and determination of the board must be deemed conclusive "in a *quo warranto* proceeding, or in any case where the order is collaterally attacked." In further elucidation of the basis upon which its conclusions rested, the court said: "Under the decisions the order of the board calling the election must here be taken as conclusive evidence that the petition presented, sufficient on its face, was in effect sufficiently signed by electors to confer the requisite power, and that the finding of the board to that effect, be it express or implied, was sustained by satisfactory proof."

[4] Assuming, without deciding, that the question whether or not all of the territory included was inhabited, was regularly submitted to and decided by the commission of the city of Alhambra, such decision is not final in this case. This is so because, for the reasons which we have stated, the petition was "on its face" not sufficient. And it is worthy of notice that in *People v. City of Lemoore, supra*, which was an action

"in the nature of *quo warranto*," the judgment pronouncing against the validity of annexation proceedings was founded upon a complaint which charged that certain parcels of land included in the attempted annexation were in fact not inhabited. These allegations were treated as material and as tendering issues upon which evidence could have been received, and the judgment (entered on default of answer after an order overruling defendants' demurrer to the complaint) was affirmed.

[5] Since, therefore, there was in fact no valid pending annexation proceeding in existence on the eighth day of May, 1916, affecting any of the territory included in the proceedings for incorporation of the city of Monterey Park, it follows that the board of supervisors was authorized to receive and act upon the petition for such incorporation, and that the incorporation proceedings, conceded to be regular in form are valid.

The judgment is affirmed.

Shaw, J., and James, J., concurred.

[Civ. No. 2647. First Appellate District, Division One.—April 19, 1919.]

GEO. H. C. MEYER et al., Respondents, v. F. J. SULLIVAN et al., Appellants.

- [1] **CONTRACTS — SALE OF WHEAT "F. O. B." — ACTION FOR BREACH — PLACE OF DELIVERY — EVIDENCE — USAGES AND CUSTOM.**—In an action for damages for breach of contract to deliver a cargo of wheat to plaintiffs "f. o. b." a designated steamer at a given port, evidence of the nature of the transaction, and the usages and custom of the trade in such matters, is admissible for the purpose of determining the place of delivery of the wheat contemplated by the parties under the "f. o. b." clause.
- [2] **ID.—INTERPRETATION OF TERM—PROVINCE OF TRIAL COURT.**—In such action, it is the province of the trial court to apply the knowledge gained from the testimony of the witnesses as to the usages and custom of the trade in such matters to the surrounding circumstances

in which the parties were placed, and to find and determine what "f. o. b." the designated steamer implied.

- [3] **ID.—MEANING OF TERM "F. O. B."**—The general rule seems to be that if the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of "f. o. b." depends on the connection in which it is used, and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery.
- [4] **ID.—PROVISION FOR BENEFIT OF BUYERS—WAIVER.**—A provision in a contract obligating the sellers to transfer the goods agreed to be sold from the dock to the deck of the vessel is in the nature of a covenant for the benefit of the buyers which they can waive.
- [5] **ID.—EFFECT OF WAR CONDITIONS—PERFORMANCE NOT EXCUSED.**—The fact that the war conditions rendered the contemplated means of performance unavailable did not excuse the sellers from the performance of their contracts where the buyers were ready, willing, and able to perform their part of the contract.
- [6] **ID.—BREACH—MEASURE OF DAMAGES.**—In an action for damages for breach of contract to deliver a cargo of wheat, in arriving at the amount of damages suffered by the plaintiffs, it is proper for the court to take into consideration the difference between the contract price agreed to be paid for the wheat by plaintiffs, and the market price, which may be taken as the value, at the agreed time and place of delivery.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Crothers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Andros & Hengstler, Louis T. Hengstler and Golden W. Bell for Appellants.

McCutcheon, Olney & Willard and J. M. Mannon, Jr., for Respondents.

WASTE, P. J.—This is an appeal by the defendants from a judgment in the sum of \$2,613.30, entered in favor of plaintiffs for damages alleged to have been suffered by reason of the breach of defendants to deliver a cargo of wheat to plaintiffs at Seattle during the month of September, 1914.

After negotiations between the parties looking to the purchase and sale of a quantity of wheat, the plaintiffs wrote to defendants two letters, which were as follows:

"454 California St.

"San Francisco, Cal., June 26th, 1914.

"Friday

"Sept. Shipt.

"Received Jun 27, 1914.

"Answered _____

"Messrs. F. J. Sullivan & Co.,

"310 California St., City.

"Dear Sirs: It is hereby confirmed that you have sold us and that we have bought from you, two hundred & fifty (250) long tons of No. 1 White Walla Walla wheat, for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar, forty three & one-third cents (\$1.43 1-3) per 100 lbs. f. o. b. Kosmos steamer at Seattle, with the usual official certificate of the grain inspector to accompany the draft on us from the north.

"We send you this in duplicate. Kindly return one copy to us with your signature.

"We are, dear sir,

"Yours very truly,

"MEYER, WILSON & Co.

"GM/P.

"Approved:

"F. J. SULLIVAN & Co.

"454 California St.,

"San Francisco, Cal., July 1st, 1914.

"Wednesday.

"Messrs. F. J. Sullivan & Co.,

"310 California St., City.

"Dear Sirs: It is hereby confirmed that you have sold us, and that we have bought from you, two hundred & fifty (250) tons of No. 1 White Walla Walla wheat, for shipment in September, doubtless early in September, from Seattle, in double bags, at one dollar, forty one and two-thirds cents (\$1.41 2-3) per 100 lbs., f. o. b. Kosmos Steamer at Seattle, you to accompany your invoice for the grain with the usual certificate of the grain inspector.

"We shall in due course give you the marks for this lot, as well as the prior lot of 250 tons for September shipment.

"We send you this in duplicate. Kindly return one copy to us with your signature.

"We are, dear sirs,

"Yours very truly,

"MEYER, WILSON & Co.

"GM/P.

"Approved and accepted:

"F. J. SULLIVAN & Co."

The letters were duly received by the defendants, who thereupon indorsed their approval upon each of the letters as above appears, and each of the letters, containing the approval of the defendants indorsed thereon, was returned to and duly received by plaintiffs. On the respective dates of the letters, plaintiffs engaged space from the management of the Kosmos line, for the shipment of the wheat referred to, in the steamer of that company, leaving Seattle in September. This fact was not communicated to defendants by plaintiffs, but on July 20th, defendants were directly informed by the Kosmos line that the wheat was to be taken on board the steamer "Karnak," leaving Seattle in September, 1914. Plaintiffs at no time furnished, or designated, or named, any vessel or vessels, or any Kosmos steamer, at Seattle or elsewhere, on board which the wheat would be placed, loaded, or shipped, or to which said wheat should be delivered.

Subsequently, owing to the war conditions then prevailing, the Kosmos line canceled their sailing schedule. On August 13th defendants notified plaintiffs of that fact and requested to know their position with regard to the two contracts for purchase of the wheat. Not receiving a reply to their communication, defendants wrote to plaintiffs again on August 22d, making similar request. In the meantime, wheat had advanced in price. On August 26th, without referring to these letters, plaintiffs informed defendants that the wheat bought from them had been sold, on a c. i. f. basis, to a firm in Valparaiso, not at all desirous of canceling, but, on the contrary, desirous of more business, and requested that defendants make a proposition as favorable as the then higher market would permit, which plaintiffs might cable to its Valparaiso correspondent. This proposition was stated to be "a merely tentative idea advanced without prejudice, and not to be regarded as in any way affecting our [plaintiffs'] rights in the premises." Defendants made no counter-

proposition for either compromise, or cancellation, in the matter, and on September 5th, plaintiffs wrote defendants, stating they would require defendants to deliver the wheat, "in the manner customary on Puget Sound, viz., in warehouse there." Further details of the delivery were referred to in the letter. This communication was followed by another letter on September 8th, in which plaintiffs demanded that defendants deliver "the said five hundred long tons in warehouse at Seattle." On September 16th defendants replied, and, referring to the previous letters from plaintiffs relative to delivery of the wheat, stated that on account of the circumstances mentioned in the correspondence, they must decline to make delivery of the same. The receipt of this letter from the defendants was followed by two letters from plaintiffs, which were personally handed to defendants, demanding, respectively, the fulfillment of each of the contracts for sale of the wheat and suggesting that the delivery might be made to plaintiffs at the warehouse on Arlington dock, Seattle, as that was the usual pier at which the Kosmos steamer loaded, or, if more convenient to defendants, delivery might be made to plaintiffs at any other warehouse in Seattle harbor, where grain was customarily received and loaded on steamers. At the time of handing these letters to defendants, plaintiffs produced and tendered to defendants in gold coin the purchase price of the wheat referred to in the contracts, which tender the defendants declined and refused, basing their action in so doing solely upon the ground that no Kosmos steamer was available at Seattle upon which said wheat could be loaded. The refusal of the tender was followed by a letter dated the last day of September, delivered to plaintiffs, which was as follows:

"September 30th, 1914.

"Messrs. Meyer, Wilson & Co.

"San Francisco, Calif.

"Gentlemen: Referring to your letters of September 22nd, 1914, and your demand for a fulfillment of the contracts mentioned therein, we are now in a position to state positively that, owing to the fact that no Kosmos steamer has been available for shipment in September, we consider the said contracts as cancelled.

"Yours very truly,

"F. J. SULLIVAN & Co.,

"By F. J. S."

After notifying defendants that plaintiffs would hold them responsible in damages for failure to carry out the contracts, plaintiffs brought this action.

The sole issue on this appeal narrows down to an examination of the question: Were the defendants justified in refusing to deliver the wheat, solely upon the ground that no Kosmos steamer was available at Seattle during the month of September, upon which the wheat could be loaded? The answer to the question appears to depend upon the interpretation that shall be placed upon the language in the two contracts, "f. o. b. Kosmos steamer at Seattle," immediately following the price quotation.

Appellants contend that these words (the term, "f. o. b.," meaning "free on board") implied a condition as to the place of delivery of the wheat, and limited such delivery to the deck of a Kosmos steamer, and nowhere else; that the limitation and condition being impossible of fulfillment, they were absolved from the contract. The trial court took the counter-view of the respondents, and found that the f. o. b. clauses were used in connection with the price of the wheat, and not the place of delivery; that, in view of the established custom of the trade, prevailing on the Pacific Coast, and which was, and is, well known to the parties, the place of delivery contemplated by them was the Arlington dock in Seattle, the dock at which the Kosmos steamers customarily loaded, and not the deck of the vessel itself; that therefore, plaintiffs' offer to receive the wheat at the dock, coupled with the tender of, and ability to make, full payment of the contract price, was sufficient and full compliance, on their part, of the contract. The court further found that if the said clauses of the contracts implied any covenant on the part of the defendants to transfer the wheat from the dock to the deck of the vessel, such covenant was solely for the benefit of the plaintiffs, and could be waived by them.

[1] In order to determine whether or not delivery was to be made on the deck of the Kosmos steamer, as contended for by defendants, or merely on the Arlington dock, in Seattle, as claimed by plaintiffs, the trial court admitted evidence of the nature of the transaction, and the usages and custom of the trade in such matters. Appellants vigorously attack the findings and conclusions of the court, and particularly its

action in admitting testimony in proof of the custom of the trade.

We are satisfied of the correctness of the trial court's findings in these matters. The fact that the parties to this action have come to such a vigorous disagreement over the meaning of the terms of the contracts is some indication that the court might be compelled to look to other sources of information than the contracts themselves in order to arrive at a proper interpretation of the disputed point. That the evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. clauses of the contracts is borne out by the authorities. (*Cowas-Jee v. Thompson*, 5 Moore P. C. 165, [13 Eng. Reprint, 454]; *Stock v. Inglis*, 5 Asp. M. C. 294; *George v. Glass*, 14 U. C. Q. B. 514; *Marshall v. Jamieson*, 42 U. C. Q. B. 115.)

The admitted evidence fully supports the court's finding that it was and is a general custom, among buyers, sellers, and shippers of wheat in the city of Seattle, and in the city of San Francisco, and, generally, in Pacific Coast ports, "under contracts for the sale of wheat f. o. b. steamer, or f. o. b. designated steamer, for the seller to deliver, and for the buyer to receive and accept the wheat upon the dock along side of ship's tackle."

R. D. Girvin, a grain merchant on the Pacific Coast for thirty-five years, testified that by sale of grain "f. o. b. steamer," the obligation of the seller is to deliver the grain to the buyer, free of cost, at the ship's tackle, that is, delivery at ship's side ready to be hoisted into the vessel, and not that the seller has to put it on board the vessel. Otto Hillefeld, shipping agent and grain broker on the Pacific Coast for sixteen years, testified that, under a contract of sale "f. o. b. steamer," the custom is for the seller to deliver the goods to the dock, and that neither the buyer nor the seller delivers the goods on the steamer; that the steamship company issues a receipt therefor, and the cost of taking the goods from the ship's tackle, or from the dock, into the steamer is borne by the steamship company, and the dock is the point at which the buyer receives the goods from the seller. R. D. Bird, freight agent, engaged in the business of shipping and the operation of steamers on the Pacific Coast for many years, testified that it is a universal rule, and the custom, to take

delivery on the dock. Other witnesses, including a general agent of the Kosmos line, testified that the shipper had nothing whatever to do with loading the cargo from the dock into the vessel, that work being done by the vessel, or the vessel's agents.

The witnesses on the part of the defendants testified as to the use of the terms f. o. b. and "f. a. s." (free along side) in contracts. The evidence discloses that contracts might be made, between buyer and seller, using either of these terms, although sales f. a. s. seem to be of infrequent occurrence, and not readily made in the community. In both f. a. s. sales and f. o. b. sales, however, the seller of the goods pays the cost of all handling on the dock; and the cost of stevedoring, or transferring the cargo from the dock to the ship, is paid and absorbed by the ship owner from the freight, which in turn is paid by the buyer. The only distinction between the two kinds of sales appears to be as to the time when the responsibility of the seller ends. In the case of f. a. s. sales, it seems to end with delivery on the dock. In the case of f. o. b. sales, the responsibility of the seller appears to end when the commodity is on board ship. The element of cost, to either buyer or seller, does not appear to enter into the matter at all.

[2] It was the province of the trial court to apply the knowledge, gained from the testimony of these witnesses, to the surrounding circumstances in which the parties were placed, and to find and determine what the term "f. o. b. Kosmos steamer at Seattle," as used in the contracts, implied. It duly determined that it was used therein in connection with the price of the grain only, and not as fixing the exact place at which it should be delivered. In arriving at this conclusion the trial court was assisted by the position of the clause in the contracts, used as it was, in connection with the words fixing the price of the wheat sold. [3] The general rule seems to be that "if the agreement is to sell goods 'f. o. b.' at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of the 'f. o. b.' depends on the connection in which it is used, and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery." (35 Cyc. 174; *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, [40 L. R. A. 534, 74 N. W. 670]; *Burton v.*

Nacogdoches Lumber Co. (Tex. Civ. App.), 161 S. W. 25.) In *Dannemüller v. Kirkpatrick*, 201 Pa. St. 218, [50 Atl. 928], the contract read: "Bill the cargo of coffee at the same price, f. o. b. Pittsburgh." It was held that whether or not delivery was to be made at Pittsburgh was a question of fact. To like effect are *Consolidated Coal Co. v. Schneider*, 163 Ill. 393, [45 N. E. 126]; *Davis v. Alpha Portland Cement Co.*, 134 Fed. 274; *United States Smelting Co. v. American Galvanizing Co.*, 236 Fed. 596. These authorities seem to firmly establish the rule that the f. o. b. clause may be used solely with reference to the price. The finding of the court that the term "\$1.43 1-3 per 100 lbs. F. O. B. Kosmos steamer, Seattle," in one contract, and the like clause in the other, as between plaintiffs and defendants, must be held to refer to the price and not to the place of delivery, seems to us to be fully supported by the testimony.

[4] Appellants attack the court's finding on the second point, which is, that even if it be assumed that defendants had agreed and were obligated by the contracts, to transfer the wheat from the dock in Seattle to the deck of the Kosmos vessel, that this provision was in the nature of a covenant for the benefit of the plaintiffs, which they could, and did, waive. This finding, we believe, should also be upheld. (*Neill v. Whitworth*, 18 Com. B. (N. S.) 435, [144 Eng. Reprint, 513].) Paraphrasing the language of the case just cited, we cannot see how it can be of any importance to the defendants whether they delivered the wheat on the Arlington, or some other dock in Seattle, as directed by plaintiffs, or on board a Kosmos steamer, provided such delivery did not impose on them any additional expense or undue delay. It seems to be clear to us that, even if the contracts so implied, it was a stipulation inserted for the benefit of the vendees, which they could, and, under the facts of this case, did, waive. That a party to a contract may waive a provision intended for his benefit, see *Ellsworth v. Knowles*, 8 Cal. App. 630, [97 Pac. 690]. Counsel for both sides discuss in their briefs a recent case bearing upon the subject of the waiver of a covenant, similar to the one under consideration here, to wit: *Comyn and Mackel v. Douglas Fir Exploitation & Export Co.*, in the United States district court for the northern district of California, October 21, 1918. In that case the contract was for the sale of four cargoes of lumber. The vessels

on which the cargoes were to be shipped were designated, and the further stipulation of the contract was, "delivery F. O. B. mill wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. [at ship's tackles], mill wharf, Knappton, Washington." One of the vessels, the "W. H. Marston," never came to Knappton. The seller claimed that this was a breach of condition precedent, and that the buyer could not claim the right of delivery on barges, or at the dock, as the contract contemplated the presence of the vessel, "W. H. Marston," ready to receive the lumber, in order to bind the seller to the obligation to deliver. Mr. Justice Van Fleet held that the provision as to the lumber being delivered convenient to the ship's tackle was for the benefit of the purchaser, which he could waive, and was not one on which the defendant might rely.

[5] Defendants contend that both buyers and sellers were excused from performance of the contracts, by reason of the fact that war conditions rendered the contemplated means of performance unavailable; that is, because it was impossible to furnish a Kosmos steamer, both parties were released from all liability in the matter. We cannot agree with such contention. It is admitted that the plaintiffs were at all times ready, willing, and able, and attempted, to perform their part of the contract. There is no showing but that defendants were fully able to deliver the wheat contracted for, and as directed by the plaintiffs, at the place designated.

[6] In arriving at the amount of damages suffered by the plaintiffs, by reason of the breach of the contract, it was proper for the court to take into consideration the difference between the contract price agreed to be paid for the wheat by plaintiffs, and the market price, which may be taken as the value, of the same wheat in Seattle, during the month of September, 1914. The excess of the value of said wheat to the plaintiffs during that time, over and above the amount which would have been due to the defendants under the contract as the purchase price thereof, if it had been fulfilled, was the detriment caused by the breach of the defendants' agreement to deliver. (Civ. Code, sec. 3308.)

We have considered the other points made by the appellants and have examined many cases cited in their briefs. We see no merit in the points presented on this appeal. Neither do we feel justified in attempting to distinguish the

many cases cited by appellants. They are not sufficient, in our judgment, to overturn the legal conclusions arrived at by the trial court on the facts of this case.

The judgment is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 19, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 16, 1919.

All the Justices concurred.

[Civ. No. 2681. First Appellate District, Division One.—April 21, 1919.]

HENRY CONLIN, etc., Respondent, v. SOUTHERN
PACIFIC RAILROAD COMPANY (a Corporation),
Appellant.

- [1] **DISQUALIFICATION OF JUDGES—VOLUNTARY WITHDRAWAL FROM TRIAL OF CASE—QUALIFICATION TO MAKE SUBSEQUENT ORDER THEREIN.**—Where the judge of the county, although there is no showing of actual disqualification made, voluntarily retires from the trial of a case because of an intimation that he was *persona non grata* to plaintiff, he is not thereafter disqualified from making an order extending the time of defendant within which to prepare and serve its proposed bill of exceptions.
- [2] **DEEDS—RAILROAD RIGHT OF WAY—DURATION OF ESTATE—CONSTRUCTION OF CONVEYANCE.**—A deed to a railroad corporation which recites that for and in consideration of encouraging and promoting the construction of a railroad, and for other considerations, the grantor conveys the land described in such deed to the railroad company and its successors during "the legal existence of said company," upon certain specified conditions, and which deed provides that, upon the breach by the said railroad company, or its successors, "of any of the aforesaid conditions, this grant shall become void, and the estate conveyed hereby . . . shall cease and determine, and the said lands shall absolutely revert to the said party of the first part [the grantor], his said heirs and assigns, in fee simple, . . . and shall

in like manner, at the expiration of the legal existence of said company, revert to said party of the first part, his heirs and assigns, anything hereinbefore contained, to the contrary, notwithstanding" shows an intention to limit the duration of the grant to the period of the legal existence of the company, and not an intention to irrevocably dedicate the land to railroad use upon a condition subsequent.

- [3] **ID.—CONVEYANCE OF REVERSIONARY INTEREST—CONSTRUCTION OF DEED.**—A deed, made by the successor in estate of the grantor, conveying a large tract of land within which such right of way was included, conveys to the grantee the reversionary interest of the grantor therein, notwithstanding such right of way is reserved and excepted in the granting clause, where such clause is immediately followed by an explanatory provision showing an intent and purpose on the part of the grantor to convey such right of way to the grantee.
- [4] **ID.—EMINENT DOMAIN—TAKING OF PROPERTY—RIGHTS OF OWNER AND SUBSEQUENT GRANTEES—EFFECT ON CONTRACT OF RAILROAD COMPANY.**—While it is true that where land has been taken for public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time of the taking, and while it is also true that this right to compensation is a personal one which does not run with the land, nor pass by conveyance thereof after the right accrues, these doctrines in no way affect or abridge the right of the railroad corporation to enter into a binding obligation or contract with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land.
- [5] **ID.—PRIVATE CONTRACTS OF RAILROADS—PUBLIC POLICY.**—In such cases public policy does not enter into the question, nor is it at all concerned with the private contracts of railroads unless they interfere with the public welfare.
- [6] **ID.—ACCEPTANCE OF CONDITIONAL CONVEYANCE—EXPIRATION OF TERM—RIGHTS OF PARTIES.**—A railroad may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant; and such a contract may create an estate less than a fee in land taken for a right of way. If at the expiration of the estate granted the land is necessary for the railroad for railroad purposes, and the corporation or its successor elects to continue its use for a right of way, it can do so by compensating the reversioner; otherwise, it must abandon such portion of the right of way and surrender possession to the owner of the estate in reversion.
- [7] **PLEADING—OFFICE OF SUPPLEMENTAL COMPLAINT.**—A complaint (or one as amended) and a supplemental complaint are to be consid-

ered as separate pleadings, the office of the supplemental complaint being merely to bring to the notice of the court, and the opposite party, matters which occurred after the commencement of the action, and which do, or may, affect the rights asserted and the relief asked in the action, as originally instituted.

- [8] CORPORATIONS — FORFEITURE OF CHARTER — NONPAYMENT OF FRANCHISE TAX—EVIDENCE.—Forfeiture of the charter of a corporation in a given year by reason of failure to pay its franchise tax cannot be proved by testimony of a deputy of the Secretary of State that he made due search of the records in the office of the Secretary of State for the purpose, and found that no tax had been paid by the corporation for that year.
- [9] ID.—IRRELEVANT EVIDENCE—REFUSAL OF—INSTRUCTION.—Where the evidence as to the forfeiture of the charter of a corporation is irrelevant to any issue of the case, it is not error to refuse to instruct the jury on the question of such forfeiture.

APPEAL from a judgment of the Superior Court of San Mateo County. John L. Hudner, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Frank McGowan and Evan J. Foulds for Appellant.

Henry Conlin, Chas. W. Cobb, B. V. Sargent and Jos. J. Bullock for Respondent.

WASTE, P. J.—This action was brought by the East San Mateo Land Company, a corporation, to recover from defendant the sum of seventy-seven thousand eight hundred dollars, the alleged value of about four acres of land used as a portion of the right of way of the defendant corporation. The defendant, after answering plaintiff's amended complaint, moved for judgment on the pleadings, which motion the trial court granted. Judgment was thereupon entered in favor of the defendant, and the East San Mateo Land Company appealed from such judgment. On the appeal, the judgment was reversed. (*East San Mateo Land Co. v. Southern Pacific R. R. Co.*, 30 Cal. App. 223, [157 Pac. 634].)

After the case was remanded, the present plaintiff was substituted for the East San Mateo Land Company, by an amended and supplemental complaint, and the case proceeded to trial, before a court and jury, on the issues raised by the pleadings. A verdict was rendered in favor of plaintiff for

\$23,340, which judgment was duly entered. In due time, the defendant made a motion for a new trial, upon various grounds set forth in the motion. Subsequently, an order was made that defendant's motion for a new trial be granted, unless plaintiff within ten days, in writing, remit all of the judgment in excess of \$15,560, and that, if plaintiff should remit the sum of \$7,780 from the judgment within said ten days, the motion for a new trial would be denied. Within the time allowed, plaintiff filed with the clerk of the court, and served on defendant, a statement of remission in compliance with the order of the court. Defendant appeals from the judgment. The evidence is brought here by a bill of exceptions.

[1] A preliminary objection made by respondent demands our first attention. After this case was remanded on the former appeal, the judge of the superior court of San Mateo County, who had theretofore presided without objection from anyone, so far as the record discloses, was requested by plaintiff to, and did, call in another judge to retry the case. The judge so called in conducted the trial and all subsequent proceedings, except that the judge of the county made an order after the trial extending the time of defendant within which to prepare and serve its proposed bill of exceptions. This extension carried the time beyond the period limited by section 650 of the Code of Civil Procedure for such purpose. Respondent now claims that the judge who signed the order extending time was in fact disqualified, that, consequently, the order was void, and therefore no bill of exceptions having been presented and settled within the time allowed by law, there is nothing before this court for review other than the matters contained in the judgment-roll.

This whole matter was presented to the lower court on objections by respondent to the settlement of the bill of exceptions, which were overruled. It does not appear in any manner that the judge who presided at the first trial was, as a matter of fact, disqualified to preside at the second. It does appear, however, that plaintiff served on defendant a notice of motion and affidavit of disqualification which he had prepared. Neither the notice nor the affidavit were ever filed in court, or called to the attention of the judge, or used for any purpose, and were afterward, by notice served on defendant, actually withdrawn by plaintiff. The first trial judge appears

to have merely retired from the actual trial of the case, because of an intimation that he was *persona non grata* to plaintiff. We are satisfied with the lower court's ruling in the matter and the objection here is without merit.

The San Francisco and San Jose Railroad Company, the predecessor of the defendant, was incorporated under the laws of the state of California on August 18, 1860, for the term of fifty years, for the purpose of constructing, maintaining, and operating a line of railroad between the city and county of San Francisco and the city of San Jose. On the sixth day of June, 1862, Alvinza Hayward, then the owner in fee simple of the land here involved, in consideration of encouraging and promoting the construction of such railroad, and of the location and establishment of a way station, and performance of other conditions mentioned, conveyed to said San Francisco and San Jose Railroad Company, and its successors, an estate in said land, limited during "the legal existence of said company," and which deed provided that, upon the breach by the said railroad company, or its successors, "of any of the aforesaid conditions, this grant shall become void, and the estate conveyed hereby, to the said party of the second part, and their successors, shall cease and determine, and the said lands shall absolutely revert to the said party of the first part, his said heirs and assigns, in fee simple, as on his former estate therein, and shall in like manner, at the expiration of the legal existence of said company, revert to said party of the first part, his heirs and assigns, anything hereinbefore contained, to the contrary, notwithstanding."

[2] The first point made by appellant, on this appeal, is that this deed from Hayward to its predecessor had the effect to convey a fee in the land to the San Francisco and San Jose Railroad Company, and that such fee was upon a condition subsequent, that is to say, that the grantee took title in the fee during its legal existence, only to be divested thereof by some subsequent act, or event, to wit, the ceasing of the legal existence of the grantee; that the land being held upon a condition subsequent, it required some act on the part of the person entitled to take advantage of the forfeiture; that there has been no act of Hayward, or of any of his grantees, indicative of a purpose to claim by reason of a breach of condition subsequent; that the legal title to the land, therefore,

was not in plaintiff's assignor after the breach or the time of the commencement of the action.

Furthermore, the appellant contends that the grant in question, being made to the San Francisco and San Jose Railroad Company "during the legal existence of said company, and reverting in like manner at the expiration of the legal existence of said company," and the San Francisco and San Jose Railroad Company having been consolidated with the Southern Pacific Railroad Company on the eleventh day of October, 1870, the legal existence of the San Francisco and San Jose Railroad Company terminated at that moment, and therefore the plaintiff's claim is stale and barred by the various provisions of the statute of limitations.

The effect of this deed was before this court on the former appeal (*East San Mateo Land Co. v. Southern Pacific R. R. Co.*, *supra*), where many of the objections now presented on this appeal were urged on the attention of the court. While the effect of the document as evidentiary matter was not then being considered, the provisions of the deed were given interpretation, and the court said:

"No question is here presented of a breach of any condition subsequent. The right here claimed is based upon the estate in reversion to take effect in possession on the expiration of the particular estate granted by the deed. There is a broad distinction between this right and one based upon forfeiture and re-entry for breach of a condition subsequent. (*Board of Chosen Freeholders v. Buck*, 79 N. J. Eq. 472, [82 Atl. 418].) The deed in question, it is true, created certain conditions subsequent, and provided upon a breach of any of the conditions that the estate conveyed should cease and determine; but, as we have seen, it also contained the additional clause: 'and shall in like manner at the expiration of the legal existence of said company revert to said party of the first part, his heirs or assigns, anything herein contained to the contrary notwithstanding.' Nothing could be added to more clearly express the intention of the grantor.

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.' (Civ. Code, sec. 1638.) It seems plain to us, therefore, that the duration of the estate or easement granted was definite and precise, and was one limited for years and not in fee. (*Robinson v. Missisquoi R. R. Co.*, 59 Vt. 426,

[10 Atl. 522]; *Barnett v. Barnett*, 104 Cal. 298, [37 Pac. 1049]; *Weller v. Brown*, 160 Cal. 515, [117 Pac. 517]; *Burnett v. Piercy*, 149 Cal. 178, [86 Pac. 603]; 14 Cyc. 1161; *Pavkovich v. Southern Pac. Co.*, 150 Cal. 39, [87 Pac. 1097].)"

[3] It further appears from the complaint and the evidence that on the eighth day of September, 1908, Emma Rose, then owner, by mesne conveyances from said Hayward, of the land here involved, which was subject to the estate conveyed by Hayward to the San Francisco and San Jose Railroad Company, she being the owner and entitled to all of the interest, estate in remainder, and reversion in the said real property so reserved by Hayward in the deed of June 6, 1862, sold and conveyed to the East San Mateo Land Company all her right, title, and interest in and to the real property, and in and to the interest, estate in remainder, and reversion therein reserved. Appellant contends that by this deed the land company did not become the owner of the land under the Emma Rose deed. This same deed was likewise before this court on the former appeal, where, "taking it by its four corners," it was said (without here quoting the reasons therein given for the opinion):

"Equally clear is the intention of the grantor, Emma Rose, in the character and quantity of the estate conveyed by her to the East San Mateo Land Company, the plaintiff. . . . There can be no question as to the intention of Emma Rose to convey to plaintiff by her deed the reversionary interest reserved by Hayward from the San Francisco and San Jose Railroad Company and to which she had succeeded. Such intention is clearly expressed in the explanatory clause just quoted. The reservation of the twenty-one excepted parcels was beyond all doubt for the purpose of saving herself harmless from any liability upon the warranties implied from the form of her deed, in view of the previous conveyance of different parcels or interests once forming a part of the tract covered by her present conveyance, and perhaps also because it was deemed that this was the simplest and most convenient manner to describe the land to be conveyed. That she intended to convey all of the right, title, and interest that she owned in the land is plainly evident."

[4] The next point urged by the appellant upon this appeal was, in substance and effect, urged before, to wit, that as Alvinza Hayward, the owner of the land described in the

amended complaint at the time of the entry by his grantee, was entitled to damages, which right was his personal property, such right has not passed to any grantee or successor of Hayward by reason of the conveyance of the real property. We do not understand this to be an action for damages, accruing at the time the land was taken, but rather an action by the reversioner to recover compensation for the appropriation and the continued use and occupation by defendant of the land after the expiration of the estate granted. We quote from our former decision:

"It is true that where land has been taken for a public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover possession of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time the land is taken, and belongs to the owner at the time of the taking; also that this right to compensation is a personal one which does not run with the land, nor does it pass by conveyance thereof after the right accrues. These doctrines, however, in no way affect or abridge the right of railroad corporations to enter into a binding obligation or contract with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land. (Lewis on Eminent Domain, 3d ed., secs. 462, 464.) [5] In such cases public policy does not enter into it, nor is it at all concerned with the private contracts of railroads unless they interfere with the public welfare. (2 Elliott on Railroads, 2d ed., 934.) [6] A railroad, therefore, may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant; and such a contract may create an estate less than a fee in land taken for a right of way. The contract here provided for a limited estate only. If at the expiration of the estate granted the land was necessary for the railroad for railroad purposes, and the corporation or its successor elected to continue its use for a right of way, it could do so by compensating the reversioner. Otherwise it must abandon this portion of its right of way and surrender possession to the owner of the estate in reversion. (*Pool v. Butler*, 141 Cal. 46-49, [74 Pac. 444]; *McCoven v. Pew*, 153 Cal. 735, 744, [15 Ann. Cas. 630, 21 L. R. A. (N. S.) 800, 96 Pac. 893]; *Gurnsey v. Northern California Power Co.*, 160

Cal. 699, [36 L. R. A. (N. S.) 185, 117 Pac. 906].) If it elected to continue in the use after the eighteenth day of August, 1910, the time limited by the grant, the owner of the estate in reversion was entitled to compensation at that time."

Our former decision to the effect that, "If at the expiration of the estate granted, the land was necessary for railroad purposes, and the corporation, *or its successors*, elected to continue its use for a right of way it could do so by compensating the reversioner," disposes of appellant's next contention, that defendant in the present action was not a privy to the contract between Hayward and the San Francisco and San Jose Railroad Company.

[7] Appellant contends that in the supplemental complaint there is no allegation of nonpayment; that, by reason of this failure to allege that defendant did not pay the present plaintiff, no cause of action is stated. Appellant fails to note the distinction between a complaint (or one as amended) and a supplemental complaint. They are to be considered as separate pleadings, the office of the supplemental complaint being merely to bring to the notice of the court, and the opposite party, matters which occurred after the commencement of the action, and which do, or may, affect the rights asserted, and the relief asked in the action, as originally instituted (*California etc. Co. v. Schiappa-Pietra*, 151 Cal. 742, [91 Pac. 593].) The only new matter set up in the supplemental complaint related to the assignment, by which the substituted plaintiff became entitled to maintain this action, and obtain the relief demanded in the action, as originally instituted, which was compensation for the property held by defendant. An examination of the record, however, discloses that in both the amended and supplemental complaints there is a sufficient allegation of nonpayment.

The various assignments by which plaintiff became substituted as plaintiff in the action are sufficiently pleaded. As the only effect of these instruments was to enable plaintiff, after substitution, to maintain the action in accordance with the relief therein sought, we do not need to give further consideration thereto.

[8] The defendant in the court below sought to show forfeiture of the charter of the San Francisco and San Jose Railroad Company, in the year 1905, by reason of the failure

of the corporation to pay its franchise tax for that year. It called a deputy of the Secretary of State, who testified that he had made due search of the records in the office of the Secretary of State for the purpose, and found that no tax had been paid by the corporation for that year. On motion of the plaintiff, this testimony was subsequently stricken out. The testimony was incompetent for the purpose offered, and was properly excluded from the record. (*Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11, [156 Pac. 972].) In view of the decision of this court, on the former appeal, and our present holding, relative to the effect of the Hayward deed, the evidence was irrelevant to any issue of the case. [9] The subsequent refusal of the court to instruct the jury on the question of the forfeiture of the franchise by the company in question was correct. What has heretofore been said in this opinion sufficiently answers the point made by appellant that the evidence is insufficient to support the verdict and that the court committed error in the admission of evidence.

Appellant makes some sixteen specifications of error in the action of the trial court in giving and refusing certain instructions. We have carefully examined each of these specifications and considered the argument in support thereof. We find no merit in any of them. The charge as given, considered as a whole, was a complete and fair statement of the law in the case. The instructions refused were not proper.

The other points made upon the appeal are incident to the questions discussed in this opinion, and have been disposed of by what we have already said.

The judgment is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 21, 1919, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 19, 1919.

All the Justices concurred, except Lennon, J., who was absent.

[Civ. No. 2663. First Appellate District, Division One.—April 21, 1919.]

HENRY CONLIN, etc., Appellant, v. SOUTHERN PACIFIC RAILROAD COMPANY (a Corporation), Respondent.

- [1] **EMINENT DOMAIN—VALUE OF LAND—TIME—INSTRUCTION.**—In this action to recover the value of certain land appropriated by the defendant for railroad purposes, the court properly instructed the jury that in considering the *value* of the land and fixing the amount of compensation which the plaintiff was entitled to recover, such *value* was to be determined as of the time of the taking of the property by the defendant.
- [2] **ID.—COMPENSATION—MARKET VALUE.**—In such a case, the just compensation to which the plaintiff is entitled is the fair and reasonable market value of the land at the time of the taking, to wit, the highest price in terms of money which the land would bring, if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted, and for which it was capable of being used.
- [3] **ID.—JUDGMENT—ALLOWANCE OF INTEREST—MODIFICATION ON APPEAL.**—On appeal from the judgment in such an action, the appellate court has power to make an order remanding the cause with directions to the trial court to modify the judgment by including interest on the amount of the judgment, provided plaintiff is entitled to such interest and has not by some act of his own estopped himself from seeking such relief.
- [4] **ID.—GENERAL VERDICT—DISSATISFACTION WITH—REMEDY.**—Where in such action the jury returned a general verdict for a lump sum, no mention being made of either the value of the land or interest thereon, if plaintiff was dissatisfied *with the judgment entered in accordance therewith*, he had a direct remedy by motion for a new trial or by appeal.
- [5] **JUDGMENTS—ACQUIESCENCE IN—WAIVER OF OBJECTIONS.**—If a person voluntarily acquiesces in, or recognizes the validity of a judgment, order or decree, or otherwise takes a position which is inconsistent with the right of appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court.
- [6] **ID.—IMPOSITION OF TERMS—ACCEPTANCE—IMPLIED ACQUIESCENCE.**—As a general rule, if a trial court imposes terms as the condition upon which any order will be granted, or any other thing done or not done, and the party upon whom the terms are imposed accepts

them, he will be deemed to have acquiesced in the ruling and cannot afterward question its validity in the appellate court.

[7] **ID.—MOTION FOR NEW TRIAL—CONDITIONAL ORDER GRANTING—ACCEPTANCE OF REDUCED JUDGMENT—WAIVER OF RIGHT TO APPEAL.**—Where a motion for a new trial is granted to go into effect unless plaintiff stipulates to reduce the verdict, in which event the motion is denied, plaintiff by giving the stipulation and entering judgment thereon waives his right to appeal, although he entered the *remittitur* under protest and the court may have been wrong in finding that the judgment was excessive.

[8] **ID.—ACCEPTANCE OF BENEFITS—RIGHT TO APPEAL—WHEN NOT INCONSISTENT.**—The right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other. It is only in case there is no controversy as to a party's right to the amount for which the judgment was given, but he claims to be entitled to a greater amount, that he may accept the fruits of such order or judgment and appeal therefrom.

APPEAL from a judgment of the Superior Court of San Mateo County. John L. Hudner, Judge Presiding. Affirmed.

The facts are stated in *Conlin v. Southern Pacific R. R. Co.*, ante, p. 733, [182 Pac. 67].

Henry Conlin, Charles W. Cobb, B. V. Sargent and Jos. J. Bullock for Appellant.

Frank McGowan and Evan J. Foulds for Respondent.

WASTE, P. J.—Plaintiff appeals from the judgment entered herein upon the verdict of a jury. A full statement of the facts out of which the litigation accrued, together with a consideration of the law therein involved, will be found in *Conlin v. Southern Pacific R. R. Co.*, ante, p. 733, [182 Pac. 67]. Appellant's complaint on this appeal arises out of the action of the trial court in refusing to instruct the jury that compensation for the land appropriated should include interest on the value of the property from August 19, 1910, the date of its appropriation by respondent here (appellant in the other appeal), and the like refusal of the court to include interest in the judgment entered on the general finding of the jury awarding damages in a lump sum to plaintiff.

[1] The court properly instructed the jury that, in considering the *value* of the land, and fixing the amount of compensation which the plaintiff was entitled to recover, such *value* was to be determined as of the time of the taking of the property by the defendant, to wit, at the expiration of the legal existence of the San Francisco and San Jose Railroad Company, and not as of the time of the trial, or other time subsequent to the time of the taking. [2] The just compensation, to which plaintiff was entitled, the court instructed the jury, was the fair and reasonable market value of the land at that time, to wit, the highest price in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted, and for which it was capable of being used.

Plaintiff requested the court to instruct the jury that such just compensation "is the fair and reasonable market value of said land, on the nineteenth day of August, 1910, with *interest* thereon at the legal rate of seven per cent per annum, since said date to the date of the rendition of your verdict." This instruction the court refused.

After deliberation, the jury returned into court with their verdict, which, in form, found in favor of the plaintiff, and assessed the amount of his recovery at six thousand dollars (\$6,000) per acre for the 3.89 acres of land involved in the action. The court thereupon instructed the jury to again retire, and change the form of their verdict, by multiplying the number of acres by the amount per acre which they found to be the value of the land, and return a verdict for the aggregate amount. The jury did as directed. The verdict of the jury was as follows: "We, the jury in the above-entitled cause, find for the plaintiff and award him damages in the sum of twenty-three thousand three hundred and forty dollars (\$23,340.00) which he should recover from the defendant." Before the jury was discharged, plaintiff moved the court to allow interest on the said verdict at the rate of seven per cent per annum from the nineteenth day of August, 1910, and to direct the clerk to enter the same in the judgment to be entered upon said verdict. This motion the court denied, and judgment was entered in accordance with the verdict, and did not include any allowance of interest.

Defendant made a motion for a new trial, and the court made an order that a new trial be granted, unless plaintiff would, within ten days, in writing, remit all of the judgment in excess of \$15,560, in which case the motion for a new trial would be denied. In compliance with that order, plaintiff remitted the sum of \$7,780 from the amount of the judgment entered upon the verdict. The defendant appealed, and the judgment has this day been affirmed by this court.

[3] Plaintiff, on this appeal, does not challenge the action of the trial court in reducing the amount of the judgment, as a condition to denial of a new trial, but merely seeks to have this court remand the cause with directions to the court below to modify the judgment by including interest on the amount of the judgment. Under the authorities, this court, no doubt, has the power to make such an order, provided plaintiff is entitled to interest as prayed for here, and has not by some act of his own estopped himself from seeking such relief. (*Hurst v. Webster*, 128 Wis. 342, [107 N. W. 666]; *Young v. Winkley*, 191 Mass. 570, [78 N. E. 377]; *People v. California Safe Deposit etc. Co.*, 34 Cal. App. 269, [167 Pac. 181].)

[4] The judgment which was entered in plaintiff's favor followed the finding of the jury. If plaintiff was dissatisfied with it, he had a direct remedy by motion for new trial, or by appeal. Respondent contends that, as plaintiff remitted a portion of the amount allowed by the general verdict of the jury, which awarded him *damages* in the sum specified, he thereby consented to the judgment as entered, was bound thereby, and should not be allowed to appeal therefrom. Plaintiff contends that he only consented under the duress of having a new trial granted, if he did not comply with the order of the court, and that he cannot be held to have acquiesced. He contents himself on this appeal with the following citation:

"In order to bar the right of appeal on the ground of acquiescence, 'the acts relied upon must be such as to clearly and unmistakably show acquiescence, and it must be unconditional, voluntary, and absolute. And, where a judgment or decree relates to two or more distinct matters or demands, acquiescence therein as to one of such matters or demands will not bar an appeal as to the others.' (3 C. J. 665, 666; *Coffman v. Bushard*, 164 Cal. 663, [130 Pac. 525].)" (*Duncan v. Duncan*, 175 Cal. 693, [167 Pac. 141].)

[5] In the same eminent authority on which the appellant relies, and on the same pages from which the supreme court quotes as above, will be found the following: "If a person voluntarily acquiesces in or recognizes the validity of a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order or decree reviewed by an appellate court. . . . [6] As a general rule, if a trial court imposes terms as the condition upon which . . . any order will be granted, or any other thing done or not done, and the party upon whom the terms are imposed accepts them, he will be deemed to have acquiesced in the ruling and cannot afterward question its validity in the appellate court." (3 Corpus Juris, *supra*.)

[7] "Where a motion for a new trial is granted to go into effect unless plaintiff stipulates to reduce the verdict, in which event the motion is denied, plaintiff by giving the stipulation and entering judgment thereon waives his right to appeal, although he entered the *remittitur* under protest and the court may have been wrong in finding that the judgment was excessive." (3 Corpus Juris, par. 546, note (d), p. 672, and cases cited.) "Filing the *remittitur* amounted to an acceptance and consent to such judgment. It was tantamount to an agreement that all alleged errors were waived and the case settled on the proposed basis of a judgment" for \$15,560, with costs and disbursements. (*Plinsky v. Nolan*, 65 Or. 402, [133 Pac. 71].) [8] "The right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other." (*San Bernardino County v. Riverside County*, 135 Cal. 618, [67 Pac. 1047].) It is only in case there is no controversy as to a party's right to the amount for which the judgment was given, but he claims to be entitled to a greater amount, that he may accept the fruits of such order or judgment, and appeal therefrom. Such controversy existed during all the progress of the present case. The court, by its order, held that plaintiff was entitled to no judgment except upon the condition that he reduce the amount of the award of the jury. By doing so, he assented to the judgment as reduced. (*San Bernardino v. Riverside*, *supra*.)

"The defendant, under the ruling of the court, was entitled to a new trial, unless the necessity therefor was obviated by the action of the plaintiff. The court gave him his choice to accept a reversal of the judgment and a new trial upon the merits, or to remit the sum which, in the judgment of the court, was in excess of the amount that ought to have been recovered. The plaintiff elected to receive the amount of the judgment less the excess. By this election he was bound. He obtained a judgment which he would not have received had he not assented to the action of the court. That he assented reluctantly does not alter the case. By giving consent he became bound by the action of the court." (*Iron R. R. Co. v. Mowery*, 36 Ohio St. 418, [38 Am. Rep. 597].)

The judgment is affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 19, 1919.

All the Justices concurred, except Lennon, J., who was absent.

[Civ. No. 2560. Second Appellate District, Division One.—April 22, 1919.]

WINIFRED F. MARR, Appellant, v. CITY OF GLENDALE
et al., Respondents.

- [1] **WATERS AND WATER RIGHTS—USE OF WATER OF PARTICULAR STREAM—RIGHT OF COMPANY TO SUPPLY OTHER WATER.**—Where a property owner has no interest in the water of a particular stream from which the company furnishing her with water obtains its supply, she has no right to complain because such company sells all or any part of the water from which it supplied her at any particular time, so long as it keeps in its pipes other water of fair quality and reasonable in quantity and pressure.
- [2] **ID.—RIGHT OF WATER COMPANY TO ABANDON BUSINESS.**—Where such property owner was without any right of use in the water itself, even though the company had abandoned its business of supplying

property owners with water and thus left its supply pipes empty, she could not have complained.

- [3] **ID.—SUPPLYING OF WATER BY MUNICIPALITY — RIGHT TO COMPEL EXTENSION OF SYSTEM.**—From the fact that a municipality may engage in the business of supplying its inhabitants with water, it does not follow that every property owner or taxpayer, however remote his land may be situated from the distributing system, can by mandate compel such extension of the system as will make available to him that supply. It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good quality.

APPEAL from a judgment of the Superior Court of Los Angeles County. Louis W. Myers, Judge. Affirmed.

The facts are stated in the opinion of the court.

Winifred F. Marr, *in pro. per.*, for Appellant.

Evans, Abbott & Pearce and W. E. Evans for Respondents.

JAMES, J.—Appeal from a judgment denying to the plaintiff a writ of mandate. Plaintiff brought this action for the purpose of compelling the city of Glendale and its officers to furnish her water for domestic and other uses. Her complaint contained three causes of action, the first and third of which only were relied upon at the trial. Under the first alleged cause of action the right claimed was that of a property owner who, having been regularly served with water by the vendor thereof, is arbitrarily cut off from the supply. The right claimed under the third alleged cause of action was different and depended mainly upon the question as to whether an inhabitant of a city, which city is engaged in furnishing water for the use of such inhabitants, can in every case compel the municipality to connect the property of such inhabitant with its supply pipes. In the first alleged cause of action plaintiff set forth that a number of years prior to the date of the commencement of the action her property had been connected to a four-inch water main owned by the Glendale Consolidated Water Company, which main was

in turn supplied from a certain stream flowing in Verdugo Canyon; that this pipe was disconnected from the stream several years prior to the commencement of the action and that subsequent to its being so disconnected the city of Glendale acquired all the water rights and the distributing system of said Consolidated Water Company, and that subsequent thereto plaintiff's property had been without water, except such as was brought upon it by use of a pail. In the third cause of action facts were set forth showing that the city of Glendale had engaged in the business of supplying water to its inhabitants and had acquired a water system for that purpose. The answer denied that plaintiff's property was not provided with a water service, although it was admitted that this service was not being given by the city of Glendale. The preliminary facts, as stated by the complaint, were admitted and an affirmative defense was made which was available in answer to both the first and third causes of action. In this defense it was alleged as follows: "The defendants allege that the property mentioned in plaintiff's petition is located in the Verdugo Canyon, more than one mile north and east of any of the distributing lines used in connection with the water system of the city of Glendale; that said property is located at an elevation of more than two hundred feet above any reservoir owned by said city from which water could be furnished to her from its present distribution system. That in order to furnish the plaintiff with water for domestic use the city of Glendale would be compelled to construct a reservoir somewhere in the vicinity of plaintiff's property at such an elevation as is necessary to furnish proper pressure, and would then have to lay and conduct pipes from such reservoir to plaintiff's said property, all of which would amount to a large expenditure on the part of the defendant City of Glendale, such as would not be justified from any income that could be derived from such construction; that at this time and for many years prior thereto the Forest Grove Land and Water Company and its predecessors in interest, who are the original owners and subdividers of the tract of land on which plaintiff is located, owns, operates, and conducts a distributing system in said tract and that plaintiff's said property is bounded on the east and south by the distributing line laid in the street abutting plaintiff's said property, from which line the plaintiff could receive adequate water service;

that said Forest Grove Land and Water Company's system was constructed for the express purpose of furnishing this plaintiff and other residents of this vicinity with water for domestic uses, and defendants are informed, and upon said information and belief allege, that the reason why plaintiff is not now receiving water from said Forest Grove Land and Water Company is that she has been disconnected by said company by reason of nonpayment of her water bills. Defendants allege furthermore that they could not furnish the plaintiff water service on her said property without paralleling the lines of said private water company, and in event this defendant should be required to so parallel the lines of said water company, it would be necessary for this defendant, City of Glendale, to charge much more for such service than she would be required to pay to said private water company for similar service; that the defendant City of Glendale has never furnished any water to any residents of the city of Glendale located in said Verdugo Canyon for the reasons hereinabove set forth." The court found the facts in accordance with this special defense, which showed that appellant's property had available to it adequate water supply and service pipes, and showed, contrary to plaintiff's allegations, that when the four-inch pipe had been disconnected from the stream, it was supplied with water from another source and that that supply had subsequent thereto been continuous and adequate and that the pipes carrying the same immediately abutted plaintiff's property; it showed that for the city to be compelled to extend its system to the property of appellant would cause the municipality great expense. It further showed that plaintiff could receive all the water she needed by merely complying with the rules and regulations of the company owning the supply pipe abutting her property, which rules and regulations we must assume were reasonable.

Plaintiff makes no contention that she had any right to the use of the waters of the particular stream from which the four-inch pipe passing her property originally received its supply; in other words, she had no right in any part of the water at any time. With that admission, and with the facts as pleaded in the answer and found by the court before us, we can see little reason to give any extended consideration to the claim made under the first alleged cause of action.

[1] Appellant having no interest in the water, would have

no right at all to complain because the company furnishing her might have sold all or any part of the water from which it supplied her at any particular time, so long as it kept in its pipes other water of fair quality and reasonable in quantity and pressure. And this is exactly what the company did, under the facts as they were alleged and determined to be.

[2] Without any right of use in the water itself, even though the company had abandoned its business of supplying property owners with water and thus left its supply pipes empty, plaintiff could not have complained. "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit or without substantial loss; or it may conclude, without reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty." (*Fellows v. City of Los Angeles*, 151 Cal. 52, [90 Pac. 137].) This case does not reach that far in its facts; plaintiff has never been deprived of the right to take water from the pipes abutting her property and her supply from that source would be adequate and sufficient.

[3] Under the third alleged cause of action, we think, also, the facts as found by the court are such as to conclusively bar the plaintiff from any right to the relief herein sought. From the fact that the municipality may engage in the business of supplying its inhabitants with water, it does not follow that every property owner or taxpayer, however remote his land may be situated from the distributing system, can by mandate compel such extension of the system as will make available to him that supply. It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good

quality. In our opinion, the appellant failed to show facts which would justify the court in extending to her the relief demanded in her complaint.

The judgment appealed from is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 19, 1919.

All the Justices concurred, except Lennon, J., who was absent.

[Civ. No. 1685. Third Appellate District.—April 22, 1919.]

R. E. L. GOOD, Respondent, v. GEORGE E. BROWN et al.,
Appellants.

- [1] **MORTGAGES—SIGNATURE BY WIFE—RELATIVE TO OBLIGATION.**—Where the wife signs a mortgage given as security for the payment of a community debt, she is not merely a surety, but one of the principal obligors to the mortgage.
- [2] **ID.—HYPOTHECATION OF COMMUNITY INTEREST—CONSIDERATION.**—A promise by the mortgagee "to put up barley and groceries and summer-fallow the land," and to bring no action until after harvest, constitutes sufficient consideration to support the hypothecation by the wife of her interest in the community real estate.
- [3] **ID.—EXISTENCE OF PRIOR MORTGAGE—EFFECT ON FORECLOSURE OF SUBSEQUENT MORTGAGE.**—The foreclosure of a mortgage will not be barred by the existence of another prior mortgage which is security for the same debt, even though the prior one is a chattel mortgage.
- [4] **ID.—FORECLOSURE—MARSHALING OF ASSETS—PRESERVATION OF HOMESTEAD.**—Where a creditor holds two mortgages as security for the same indebtedness, one of which covers real property on which a declaration of homestead has been duly executed and recorded, the humane policy of the law requires that such homestead, if possible, be preserved for the use and home of the family, and that the creditor first exhaust the other security in satisfaction of the indebtedness.

[5] **ID.—EFFECT OF SECURITY BEING INCLUDED IN TWO MORTGAGES—RIGHTS WHERE BOTH COVER COMMUNITY PROPERTY.**—It can make no difference in the application of the principle requiring the creditor to first exhaust other than the homestead property given as security that the security is included in two mortgages instead of one, or that one covers personal property instead of real estate; nor is the question affected in the least by the fact that both mortgages cover community property.

APPEAL from a judgment of the Superior Court of Madera County. W. M. Conley, Judge. Reversed.

The facts are stated in the opinion of the court.

Ernest Klette for Appellants.

C. K. Bonestell and Kitt Gould for Respondent.

BURNETT, J.—The appeal is from a judgment of foreclosure of a mortgage on real estate. On the twelfth day of June, 1912, the defendant George E. Brown delivered his promissory note in the sum of one thousand dollars, payable ninety days after date, to the plaintiff, and to secure its payment executed a chattel mortgage upon certain personal property. Defendant Cynthia Brown was not a party to this note or mortgage, and when this suit was brought no action had been taken toward enforcing said chattel mortgage, and it existed as a valid lien on said personal property. Thereafter, on February 27, 1914, both of said defendants executed the real estate mortgage to secure the payment of this note. The land is community property, and prior to the execution of said mortgage the said defendant Cynthia Brown had executed and recorded, in due form, a declaration of homestead on said property.

The foregoing facts are undisputed, and in addition it is claimed by appellants that, when the real estate mortgage was signed by Cynthia Brown, it was agreed that the mortgagee would first exhaust the security on the personal property before resorting to the real estate mortgage.

The contentions of appellants are these: First, respondent was required to exhaust the personal property security before resorting to the foreclosure of the real estate mortgage;

second, Cynthia J. Brown was a surety on the second obligation, and by virtue of section 2850 of the Civil Code she had a right to demand that the property of the principal, that is, the personal property, be first applied to the discharge of the obligation, or, at least, by reason of the homestead, such was in effect the situation; and, third, by virtue of said agreement, plaintiff was obligated to resort first to the personal security.

As to the last of these, it may be dismissed with the statement that plaintiff testified positively that there was no such agreement, and we are bound by the finding to that effect.

The other contentions may be considered together, and to understand them fully some additional facts should be stated. Before the real estate mortgage was executed, Good became dissatisfied with the chattel mortgage security and notified Brown that unless further security should be forthcoming he would be compelled to take possession of said personal property and dispose of it. Good testified as to this: "Well, I got Mr. Brown into the store and told him that it was absolutely necessary that I foreclose this chattel mortgage unless I was given additional security, because the stock was getting older every day and being much abused by the work given them and my security was not sufficient. He at that time made a promise to me that he would give me a mortgage on a piece of property with his wife's signature to it. Later he brought the mortgage in and delivered it to me in my office at Clovis and I recorded it." The following questions and answers indicate the nature of Mrs. Brown's connection with the transaction: "Q. (By the Court.) Mrs. Brown, why did you sign the mortgage? A. Simply because I wanted to get this money to go on with the grain and harvest and to do summer-fallowing. Mr. Brown gave us to understand that there was only between six or seven hundred on the thousand. If I signed it Mr. Good was to put up barley and groceries and summer-fallow the land. My husband told me this. Q. You signed it upon your husband's statement to you that Mr. Good would furnish three hundred dollars more over the amount that was for the purpose of buying provisions? A. Yes."

It may be further stated that the plaintiff testified that he agreed not to bring an action to foreclose until after harvest. [1] It thus appears that Mrs. Brown was not a surety but

one of the principal obligors to the mortgage, which was executed to secure the payment of a community debt. [2] and the promise "to put up barley and groceries and summer-fallow the land" and to bring no action until after harvest afforded sufficient consideration to support the hypothecation of her interest in the community real estate. As to this position we deem the citation of authorities unnecessary.

[3] As to the claim that the personal security should have been exhausted first, the general rule seems to be that the foreclosure of a mortgage will not be barred by the existence of another prior mortgage which is security for the same debt. (1 Wiltsee on Mortgage Foreclosure, sec. 308.)

Under the general weight of authority, the rule is the same where the prior one is a chattel mortgage (Id., sec. 309), although it has been held otherwise in Alabama. (*Koger v. Weakly*, 2 Port. (Ala.) 516.)

[4] But the situation is changed by the fact that a homestead had attached to the real property, and it is the humane policy of the law to preserve, if possible, the homestead for the use and home of the family.

The principle is developed and well expressed in *Blood v. Munn*, 155 Cal. 228, [100 Pac. 694]. Therein the mortgagee held a lien on two parcels of land, one being the homestead of the mortgagor and the other a tract not having that character. Discussing the relation of the parties to the enforcement of the lien, the supreme court said that the homestead claimants "stand in the same situation as a surety for the payment of a debt, or the situation of a third person who had a lien upon or interest in only one of two mortgaged parcels, with respect to a prior mortgage upon both." After declaring the equitable right of such surety or third person, and that the right of a homestead claimant is as sacred as that of a surety, the court proceeds: "For these reasons it has been decided that the homestead claimant may have his homestead protected and preserved as far as possible, when it is covered by a mortgage which also includes other property, by requiring the other property to be sold and applied upon the debt before the sale of the homestead." In support of this doctrine a large number of authorities is cited. We shall go no further in that direction than to quote the following from 2 Freeman on Executions, section 440: "Perhaps a more

difficult question is, May one who has a lien on homestead and other property be compelled by the homestead claimants to first resort to the latter? On the other side, it is insisted that the right to compel a marshalling of assets never existed in favor of judgment debtors but only on behalf of persons claiming under them, and that the creation of the lien by the homestead claimants was, in effect, an agreement on their part that the lienholder might, at his discretion, sell any of the property which was subject to such lien, and that such agreement precludes such claimants from exercising any control over such discretion. But homestead laws should be liberally construed, and no intention should be presumed; nor should any interpretation be indulged which is at variance with the natural and obvious purpose of the parties. . . . Hence a mortgage on a homestead, and other property may fairly be interpreted as a waiver of the homestead right only as far as may be necessary to secure the debt; in other words, as a stipulation that the homestead may be sold, if the other property proves inadequate to satisfy the mortgagee's demand. Under this interpretation, the homestead claimants are entitled to compel the sale of the other property in preference to the homestead and need not submit to the sale of the homestead until the other securities have been exhausted, without fully discharging the debt."

[5] Of course, it can make no difference in the application of the principle that the security is included in two mortgages instead of one, or that one covers personal property instead of real estate. In fact, there would seem to be greater reason in case of a chattel mortgage to compel the mortgagee to resort to that before demanding a sale of the homestead.

Nor do we think that the question is affected in the least by the fact that the chattel mortgage covered community property as did the homestead. If the personal property had been the separate estate of the husband, the wife, regardless of the consideration of the homestead, could, probably, compel a resort to said personal property before a foreclosure of the mortgage of the community property.

The ruling principle here is, though, as we understand it, the superior solicitude of a court of equity for the preservation of a homestead over other property not charged with that character.

We think, therefore, that the court should have suspended judgment in the suit until such time as plaintiff had exhausted the security under said chattel mortgage.

The judgment is reversed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 19, 1919.

All the Justices concurred, except Lennon, J., who was absent.

[Civ. No. 2830. First Appellate District, Division One.—April 23, 1919.]

A. B. GRANTHAM, Appellant, v. W. F. ORDWAY et al.,
Respondents.

- [1] **NONSUIT—WHEN PROPER.**—A court may grant a nonsuit only when, disregarding the conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legal inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given.
- [2] **EVIDENCE—PRESUMPTIONS.**—Whenever under a given state of facts a presumption arises, such presumption is itself evidence.
- [3] **ID.—CONFLICT OF EVIDENCE.**—A presumption, even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact.
- [4] **EMPLOYER AND EMPLOYEE—LIABILITY FOR TORTS.**—Where a servant, acting within the general scope of his employment and authority, injures one, the employer may be held liable.
- [5] **ID.—DRIVING OF AUTOMOBILE—SCOPE OF EMPLOYMENT—PRESUMPTION—CONFLICTING EVIDENCE—QUESTION FOR JURY.**—Where it is admitted that the automobile which struck the plaintiff belonged to the defendant employer and that the person driving was its employee, the presumption arises that such person was acting within the general scope of his authority; and such presumption is not

destroyed as a matter of law by the testimony of such employee that he was acting on his personal business. The question of whether he was so acting becomes a question of fact for the jury to decide.

- [6] NEGLIGENCE — PERSONAL INJURIES BY AUTOMOBILE — ACTION FOR DAMAGES — PRIMA FACIE CASE AGAINST EMPLOYER — NONSUIT — ERROR.—In an action for damages for personal injuries received through being struck by an automobile driven by an employee of a corporation, proof of the ownership of the automobile by the corporation and its operation at the time of the accident by such employee establishes a *prima facie* case against the corporation; and where the testimony of such employee is not so convincing, or free from justifiable doubt, as to amount to an admission by the plaintiff, who offers his testimony in evidence, or to eliminate the presumption that such employee at the time of the collision was engaged upon the business of his employer, the trial court commits error in granting a nonsuit as to the corporation.

APPEAL from a judgment of the Superior Court of Fresno County. Geo. E. Church, Judge. Reversed.

The facts are stated in the opinion of the court.

A. M. Drew for Appellant.

Manning, Thompson and Hoover for Respondents.

WASTE, P. J.—This is an appeal by the plaintiff from that portion of the judgment, entered by the court in the above case, giving defendant Pacific Acreage Company, a corporation, judgment on motion for nonsuit.

Plaintiff was injured, during the business hours of the day, by an automobile driven by the defendant Ordway, and admittedly owned by the defendant Pacific Acreage Company, as to which defendant the nonsuit was granted. It was likewise admitted that at the time of the accident Ordway was in the employ of the Pacific Acreage Company, the disclaimer of liability by that defendant resting upon the denial that at that time Ordway was the agent of the company, or acting within the scope of his employment.

In addition to these admissions, it was shown that Ordway was the son of the president of the Pacific Acreage Company and was the general manager of the company's ranch, located near Fresno. His work was mainly in managing operations on the ranch, he purchasing supplies and having men working

under him. He testified that he "came and went as he chose, so long as he kept the business of the Pacific Acreage Company moving and attended to. He went to town and various other places, as he saw fit. Nobody dictated to him when he should go and when he should come back." He used the automobile of the company, apparently, as he pleased, and in going about for the purpose of purchasing the necessary supplies for the ranch and attending to its business.

Plaintiff introduced the deposition of the defendant Ordway, as part of his case, in which Ordway testified that on the morning of the accident he had driven from the Pacific Acreage Company's ranch in the automobile to Fresno, for the sole purpose of purchasing a banjo, which he had previously ordered; that, the purchase concluded, he did not remember having stopped at any other place in town; that the purchase of the banjo was his main object, and, that accomplished, that was all he was thinking of; that he made no purchases for the Pacific Acreage Company and did nothing whatsoever for the company.

In support of his claim that the court erred in granting the motion for nonsuit on the foregoing testimony, the appellant relies upon the manifest conflict, arising in the case from the weight which must be given certain presumptions, as to the liability of the defendant Pacific Acreage Company resulting from the admitted facts in the case, as against the testimony of defendant Ordway tending to completely overthrow such presumptions.

[1] "A court may grant a nonsuit only when disregarding the conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legal inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given." (*Perera v. Panama Pacific Int. Exp. Co.*, 179 Cal. 63, [175 Pac. 454].)

[2] Whenever under a given state of facts a presumption arises, such presumption is itself evidence. Courts and jurors are not bound to decide in conformity with the declaration of any number of witnesses, which do not produce conviction in their minds, against a less number, or against a presumption, or other evidence, satisfying their minds. (Code Civ. Proc., sec. 2061, subd. 2.) [3] A presumption,

even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact. (*Fanning v. Green*, 156 Cal. 279, [104 Pac. 308]; *Moore v. Gould*, 151 Cal. 726, [91 Pac. 616]; *People v. Milner*, 122 Cal. 171, [54 Pac. 833]; *People v. Siemsen*, 153 Cal. 390, [95 Pac. 863].)

Section 1963 of the Code of Civil Procedure is as follows:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: . . .

"20. That the ordinary course of business has been followed."

[4] The general principle, that where a servant, acting within the general scope of his employment and authority, injures one, the employer may be held liable, is not disputed in this case, the respondents' contention, as before indicated, being that at the time of the accident the defendant Ordway had departed from the usual line of his employment and was transacting business purely personal, and having no relation to the business of his employer.

[5] Under the decisions of this and other states, however, from the admitted fact of ownership of the automobile by defendant Pacific Acreage Company and its employment of Ordway, a presumption arose that Ordway was acting within the general scope of his authority, to such an extent as to bind his employer. Upon these facts being admitted in the case, the question as to whether Ordway was so acting became a question for the jury to decide. (*Adams v. Wiesendanger*, 27 Cal. App. 593, [150 Pac. 1016].) The automobile being admitted to belong to the defendant Pacific Acreage Company, a presumption arose that it was used for its benefit and on its own account. That presumption was not destroyed as matter of law by the testimony of defendant Ordway. "Even though his explanation of the use of the car would absolve him if credited, the question of whether it should be credited was one of fact for the jury." (*Schreiber v. Matlack*, 90 Misc. Rep. 667, [154 N. Y. Supp. 109]; *Ferris v. Sterling*, 214 N. Y. 249-253, [Ann. Cas. 1916D, 1161, 108 N. E. 406].) In the latter case there was much conflicting testimony, and the court held that the fact that defendant was

owner of the automobile, and the chauffeur in his employ to operate it, was sufficient to make out a *prima facie* case that the chauffeur was acting within the scope of his employment at the time of the accident, but that the *prima facie* showing was not conclusive, and if the testimony of the chauffeur that he took the automobile for his own business was true the owner was not responsible. In an action for injuries to plaintiff by being struck by an automobile operated by a chauffeur, in considering whether the car was being used at the time for the purposes of the corporation of which defendant was president, or for his own purposes, or by the chauffeur for purposes authorized by neither the corporation nor the defendant, the most favorable view for the defendant which can be taken on appeal is that such question was for the jury to determine. (*Benn v. Forrest*, 213 Fed. 763, [130 C. C. A. 277].)

The case of *Jessen v. Peterson, Nelson Co.*, 18 Cal. App., at page 353, [123 Pac. 221], is instructive as showing the kind of evidence sufficient to support a verdict in this class of cases. The plaintiff, there, was struck by a horse and buggy owned by the defendant and driven by its vice-president. It was contended that the evidence was insufficient to support the judgment in that it failed to show that the person in charge of the horse and buggy was, at the time of the accident, in any wise occupied in the performance of any duty relating to the business of the defendant. On the appeal this court said:

"It was an admitted fact in the case that the horse and buggy belonged to the corporation defendant, and that the driver, Charles Nilson, 'was an officer of the defendant who had the right to operate the buggy.' Nilson was the vice-president of the defendant, and testified as a witness in its behalf. Upon his cross-examination it developed that in the performance of his duties as vice-president he 'had no regular hours whatsoever; that he had to go around all over the city sometimes; had to go out to the park and Richmond, where the corporation was working at the time; had to go everywhere and see that the work was all right.'

"From this it would appear that in addition to being vice-president of the defendant, Nilson was also the general superintendent of its work, and that in the performance of his duties he was granted a roving commission which permitted

him to look after the business of the defendant at the times and in the manner which best suited his own convenience. It is the accepted rule in this and other jurisdictions that where an employee is intrusted with the possession and operation of a vehicle, with permission to use it at his discretion in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employee in the use and operation of the vehicle; and in such a case it is not necessary for the person seeking damages to prove that at the time of the injuries the employee was engaged in executing any particular business or specific command of his principal. That the employee, at the time of the commission of the tort, was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury. (*Mulvehill v. Bates*, 31 Minn. 364, [47 Am. Rep. 796, 17 N. W. 959]; *Rahn v. Singer Mfg. Co.*, 26 Fed. 912; *Riordan v. Gas Consumers' Assn.*, 4 Cal. App. 639, [88 Pac. 809].)"

The court held "that the testimony of Nilson, coupled with the admitted fact that the defendant was the owner of the horse and buggy, and had conferred upon Nilson the right of using the same in its business, sufficiently supports the trial court's finding that the horse and buggy were owned by the defendant, and 'wholly in the possession and under the control of the defendant' at the time of the accident."

In the case of *Riordan v. Gas Consumers' Assn.*, *supra*, the court with approval quoted from the case of *Mulvehill v. Bates*, *supra*, where, in speaking of the liability of a defendant for the negligence of a driver, while engaged in carrying a load of poles for himself, the court said: "But here the wagon was intrusted, generally, to the driver, to be used entirely at his discretion." In *Rahn v. Singer Mfg. Co.*, *supra*, the court said: "In order to fix responsibility of the defendant, it is not necessary for the plaintiff to prove that the servant, for whose tort he seeks damages, was at the time of the commission of the tort engaged in executing specific commands of the defendant. It is enough for him to prove that the servant was acting within the general scope of his employment, but this much is necessary. If the usage of the parties, under the servant's con-

tract of hiring, was of such a character that it allowed the servant to attend to his duties on such terms as suited his convenience, and at the time of the commission of the tort he was engaged in his own private business, but at the same time was pursuing the defendant's business in the service for which he was employed, the defendant would still be liable."

[6] The admitted facts in the case as to the ownership of the automobile by defendant, the Pacific Acreage Company, and its operation at the time of the accident by its manager, established a *prima facie* case against the company. In anticipation of the trial, the defendant took the deposition of Ordway. Plaintiff, as part of his case, read this deposition to the jury. From this deposition, the facts as hereinbefore set out, relating to his employment by the Pacific Acreage Company, and other circumstances, were established. It was shown thereby that at the time of the accident Ordway was operating the automobile of the defendant Pacific Acreage Company, under a contract of hiring of such character that it allowed him to attend to his duties as manager at such time and in such manner which best suited his own convenience. He enjoyed a "roving commission" and was intrusted with the possession and operation of the vehicle with permission to use it at his discretion in the business in which he was employed. (*Rahn v. Singer Mfg. Co.*, *supra*; *Jessen v. Peterson, Nelson Co.*, *supra*.)

Under the admitted circumstances of Ordway's employment, we are not willing to hold that his testimony as to the manner in which he performed his duties connected therewith and his rather uncertain testimony as to his movements following the consummation of the personal business, which he claims brought him from his employer's ranch some distance into the city of Fresno, on the day of the accident, is so convincing, or free from justifiable doubt, as to amount to an admission by plaintiff, or to eliminate the presumption that Ordway at the time of the collision was engaged upon the business of his employer. (*Ferris v. Sterling*, *supra*.)

Furthermore, plaintiff is not bound by Ordway's testimony. "A party to the record of any civil action . . . may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness

shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence." (Code Civ. Proc., sec. 2055.)

The judgment in favor of the defendant Pacific Acreage Company is reversed.

Richards, J., and Nourse, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 21, 1919.

[Civ. No. 2757. First Appellate District, Division Two.—April 23, 1919.]

MADGE WEYER, Respondent, v. GUSTAVUS WEYER, Defendant; H. P. WEYER, Appellant.

- [1] ACTION FOR DIVORCE—VENUE.—The statute requires that an action for divorce must be brought in the county of the residence of the plaintiff.
- [2] ID.—JOINDER OF FRAUDULENT GRANTEE OF HUSBAND.—A wife's action for divorce against her husband and her husband's brother, who is alleged to be the fraudulent grantee of the husband, wherein the wife, in addition to seeking a divorce, alimony, counsel fees, and costs, prays that the conveyance and transfer of her husband to his brother be decreed to be fraudulent and void as to her, and that a lien be imposed upon the property as security for the payment of such sums as may be directed by the court to be paid by the husband, does not constitute two causes of action; and such case is not within the provisions of section 5 of article VI of the constitution or section 392 of the Code of Civil Procedure relating to place of trial.
- [3] ID.—WHEN SECTION 392, CODE OF CIVIL PROCEDURE, APPLICABLE.—An action must be wholly local in its nature to require it to be brought in the county designated by section 392 of the Code of Civil Procedure.
- [4] DIVORCE—EXISTENCE OF COMMUNITY PROPERTY—PLEADING—PROOF. In an action for divorce, in the absence of an allegation that there is community property, the presumption is that there is no community property.

- [5] **ID.—PROVISION FOR SUPPORT OF WIFE—LIABILITY OF SEPARATE PROPERTY OF HUSBAND.**—In an action for divorce, provision is to be made for the wife, and where there is no community property, it must be from the separate property of the husband, either owned or to be acquired by him. No reason exists why either the wife or the chancellor should forego the certainty of recourse to property owned by the husband for the uncertainty of speculation regarding future earnings.
- [6] **ID.—ALIMONY—FRAUDULENT CONVEYANCE BY HUSBAND.**—The husband cannot put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. **Thos. F. Graham**, Judge. Affirmed.

The facts are stated in the opinion of the court.

L. L. Dennett and J. C. Needham for Appellant.

Sullivan & Sullivan and Theo. J. Roche for Respondent.

BRITTAIN, J.—The appeal is from an order denying a motion for change of place of trial. The plaintiff wife sought divorce on the ground of extreme cruelty, and joined as a defendant her husband's brother, alleged to be the fraudulent grantee of the husband. The brother alone moved to change the place of trial.

The plaintiff alleged the husband is the owner of a one-third interest in four promissory notes of the aggregate face value of nearly fourteen thousand dollars, secured by mortgages and deeds of trust, and in certain described lands, some of which are in Stanislaus County and some in Tuolumne County. It is further alleged that on January 31, 1917, some eight months before suit was brought and three months before the separation of the parties, the husband purported to grant and convey to his brother, the appellant, upon no consideration, all the property without the knowledge of the plaintiff, and with the intent of defrauding her of her right to subject the same to her claim for maintenance, support, and alimony. After praying for a divorce the plaintiff prayed for a monthly sum for her support and lump sums for counsel fees and costs. She further prayed the conveyance and

transfer of her husband to his brother be decreed to be fraudulent and void as to her, and that a lien be imposed upon the property as security for the payment of such sums as may be directed by the court to be paid by the husband to her for support, counsel fees, and costs.

The appellant moved for change of place of trial on the ground that San Francisco, the place of residence of the plaintiff, is not the proper county, and that Stanislaus is the proper county, by reason of the residence of H. P. Weyer there. Further, that as to him, the action is for recovery of real property and the determination of the right or interest of the plaintiff therein, and that all the real property is in the counties of Stanislaus and Tuolumne.

The argument on behalf of the appellant in substance is that section 5 of article VI of the constitution provides that all actions for the recovery of possession of, or for the enforcement of liens upon, real property must be commenced in the county where the real property is situated, and, under Code of Civil Procedure, section 392, tried in such county; that, so far as H. P. Weyer is concerned, the suit is simply one concerning title to his real estate, and that it is not in any way subsidiary to the suit for divorce with which he has nothing to do. It is further argued there is a misjoinder of causes of action, one being the action for divorce in which the brother must sit as a silent spectator, and the other an action to set aside a conveyance in which the husband, the grantor, must remain equally quiescent.

[1] The statute required the action for divorce to be brought in the county of the residence of the wife. [2] If the suit were, as claimed on behalf of the appellant, one involving two separate causes of action, and the second cause of action were for the recovery of the property, under the constitutional provision the second cause of action would necessarily have been brought in one of the counties in which the land is, and it would follow under the provisions of section 427 of the Code of Civil Procedure that the two causes could not be joined. There are not two causes of action. The case is not within the provisions of section 5 of article VI of the constitution or section 392 of the Code of Civil Procedure. [3] An action must be wholly local in its nature to require it to be brought in the county designated by section 392 of the Code of Civil Procedure. (*Smith v. Smith*,

88 Cal. 573, [26 Pac. 356]; *Clark v. Brown*, 83 Cal. 181, [23 Pac. 289].)

The appellant contends there is a different principle involved where separate property of the husband is conveyed from that where the property belonged to the community, and, further, that regardless of the power of a court of equity in a suit for maintenance, or more properly alimony, without divorce, there can be no joinder such as is here made in a suit for divorce. The legislature has dealt with this subject. Even though divorce is denied, the court in the divorce action may provide for the maintenance of the wife (Civ. Code, sec. 136); it may provide for alimony pending the suit (Civ. Code, sec. 137); and for maintenance after divorce (Civ. Code, sec. 139). The court may require reasonable security for providing maintenance or making any payments required under the provisions of the chapter, and may enforce the same by an appointment of a receiver, or by any other remedy applicable to the case (Civ. Code, sec. 140). In executing the preceding sections, the court must resort (1) to the community property; then (2) to the separate property of the husband (Civ. Code, sec. 141). The appellant asserts that it appears in this case the property transferred by the husband was his separate property. It further appears negatively from the complaint there was no community property to which the court might resort for the maintenance of the wife. [4] In the absence of an allegation that there is community property, the presumption is there was none. No such allegation is made in the complaint in the present case. (*Kashaw v. Kashaw*, 3 Cal. 312.) [5] Provision is to be made for the wife and it must be from the separate property of the husband, either owned or to be acquired by him. No reason exists why either the wife or the chancellor should forego the certainty of recourse to property owned by the husband for the uncertainty of speculation regarding future earnings.

In *Kashaw v. Kashaw*, *supra*, the wife sued for divorce, joining certain other defendants to whom it was claimed by the wife the husband, with intent to defraud her of her community rights, had conveyed community property. It was contended there, as here, that the bill was multifarious. Basing its decision upon the then existing act in relation to husband and wife, which required a division of the com-

munity property, the supreme court said: "It seems, from this, to be beyond dispute, that a partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and consequently is necessarily one of the proper subjects of the action. How, then, can its introduction render the bill subject to the charge of multifariousness? The bill would really not be perfect without it, for the purpose of obtaining the decree of division, as contemplated by the law. . . . And as the one-half of it is equitably the right of the plaintiff, and to be so determined in this case, she may well make a party of anyone claiming an interest in it, in order that she may obtain a complete determination." In the present case, as there is no community property, it is the duty of the court to make provision for the wife out of the separate property of the husband. The reasoning of the court in the *Kashaw* case is directly applicable. Where the reason is the same, the rule should be the same. (Civ. Code, sec. 3511.)

The rule of *Kashaw v. Kashaw* has never been questioned. It has been made the basis of numerous decisions in other jurisdictions. It is cited as a leading case in a note appended to a case decided in Alabama, where it was held that a bill for divorce was not rendered multifarious by a prayer for a conveyance by the husband to the wife of lands paid for by her with the title resting in him. (*Singer v. Singer*, [165 Ala. 144], 29 L. R. A. (N. S.) 819, [138 Am. St. Rep. 19. 21 Ann. Cas. 1102, 51 South. 755].) From the note it might seem that the *Kashaw* case was limited to the division of the community property. The appellant in this case relies on a California case cited in the note. (*Cummings v. Cummings*, 2 Cal. Unrep. 774, [14 Pac. 562].) It was published in the Pacific Reporter, and would seem to support the contentions of the appellant. It was not published in the official reports, no doubt because upon rehearing the supreme court expressly declined to determine the questions which in the unreported decision the Department undertook to decide in a manner at variance with the *Kashaw* case. In the unreported Department opinion, which was concurred in by Mr. Justice McFarland, the wife, suing for divorce and a division of the community property, joined certain other parties in the litigation, alleging that they fraudulently entered into a contrivance with the husband to defeat the plaintiff of her

rights. The argument was made, which is made here, that under Code of Civil Procedure, section 427, there was a misjoinder of causes of action. In the Department opinion it was said: "We do not find the causes of action here united . . . to belong to any of the classes of actions allowed to be united by the above section." (*Cummings v. Cummings*, 2 Cal. Unrep. 774, [14 Pac. 562].) Without reference to the earlier Department opinion, in the same case, upon the same appeal, the supreme court in *Bank* expressly determined it was not necessary to decide whether the court below did or did not err in overruling the demurrer, upon which ruling the Department opinion was based, because on other grounds the judgment appealed from was reversed. The court in the final disposition of the case determined that the bank which was the mortgagee defendant in the divorce suit was a necessary party to the accounting. "Its mortgage is recognized as valid in the judgment, and no decree could properly be entered determining what sums had been paid to it by the defendant Ketchum, or giving priority to the alimony or suit money in the absence of the bank." (*Cummings v. Cummings*, 75 Cal. 434, [17 Pac. 442].) Mr. Justice McFarland concurred specially in the *Bank* decision, saying: "The only proper parties to a divorce action are, generally, the husband and wife." His statement is fundamental, but under the rule of the *Kashaw* case and in the *Cummings* case, where it is charged the husband has conveyed the community property, the grantee may be a proper party, as a third party may be a proper party under certain other circumstances. The appellant in the closing brief refers to the special concurring opinion of Mr. Justice McFarland in the *Cummings* case. In another part of his concurring opinion, the learned justice said: "If, when such a suit has been commenced, or is about to be commenced, one of the parties having such a suit in view colludes with a third party with intent to cover up community property, such third party may, perhaps, be made a defendant for the purpose of keeping the property *in statu quo* until after the determination of the action." (*Cummings v. Cummings*, 75 Cal. 442, [17 Pac. 446].)

Mr. Justice McFarland, after the decision of *Cummings v. Cummings*, said: "The very purpose of alimony in such a suit is to give support to the wife and to enable her to conduct her side of the litigation pending the trial of the issues made

by the pleadings." (*Storke v. Storke*, 99 Cal. 621, [34 Pac. 339].) [6] The husband cannot put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony. (*Murray v. Murray*, 115 Cal. 266, [56 Am. St. Rep. 97, 37 L. R. A. 626, 47 Pac. 37].) Counsel for the appellant state there is a broad distinction between suits for divorce and for support. Neither argument nor citation of authority is presented upon this claimed distinction. It does not exist. Under the broad equitable powers of the court, and in applying the provisions of the Civil Code sections to which reference has been made, the rule announced in *Kashaw v. Kashaw* must be held to extend to transfers of separate property where there is no community property.

In regard to the claim that the suit in so far as it affected the appellant's interest in real property was within the provisions of section 392 of the Code of Civil Procedure, in a similar case where the same question arose as to an alleged fraudulent conveyance of community property, the supreme court held that section does not apply, saying: "The object of the action, however, was not simply to procure the cancellation of the deed and reconveyance of the property. Another and probably much greater object was to secure a dissolution of the bonds of matrimony, and, so far as this last matter was the subject of the action, the proper county for the trial thereof was the county of the defendant's residence. It has been held here that if real and personal actions are joined in the same complaint, the case falls within section 395 of the Code of Civil Procedure, and must be tried in the county of defendant's residence." (*Warner v. Warner*, 100 Cal. 11, [34 Pac. 523].)

In that case the plaintiff wife was a resident of San Bernardino. The real property was also in that county. F. R. Warner was joined as the alleged fraudulent grantee of C. A. Warner, the husband. The defendants sought to have the suit removed to their place of residence. The case was decided upon the construction of section 128 of the Civil Code, requiring the residence of the plaintiff in the county in which the action is commenced, and sections 395 and 397 of the Code of Civil Procedure, requiring personal actions on motion to be transferred to the place of residence of the defendants. Both defendants joined in the motion. Here the

motion is made on behalf of one only of the defendants. The plaintiff in that case insisted upon the trial of the action in the county where the real property was and which was her place of residence. The court determined that it was a personal action falling within section 395 of the Code of Civil Procedure, and not a local one under section 392 of the Code of Civil Procedure, and said the alleged fraudulent grantee "might perhaps have insisted upon the action being retained in the county of San Bernardino for trial." The statement of what Warner might perhaps have insisted upon, if not at variance with the matter decided, did not establish a rule of law contrary to the conclusions reached on this appeal.

The order appealed from is affirmed.

Langdon, P. J., and Haven, J., concurred.

[Civ. No. 1996. Third Appellate District.—April 24, 1919.]

J. N. LISENBEE, Respondent, v. MAUD IRENE
LISENBEE et al., Appellants.

- [1] **COMMUNITY PROPERTY — PRESUMPTION — REBUTTAL EVIDENCE.**—In this action to quiet title to certain real property claimed by one of the defendants to have been the community property of herself and plaintiff's predecessor, the presumption that the property was community in character, it having been acquired during coverture, was overcome by the positive testimony of plaintiff's predecessor that it was paid for out of money received for the sale of other land which he owned prior to his marriage to such defendant.
- [2] **APPEAL—FINDINGS—SUSPICIOUS CIRCUMSTANCES.**—It is idle to ask an appellate court to set a finding aside because the circumstances may be somewhat suspicious and there may be some reason for believing that plaintiff's predecessor was trying to defraud his wife.
- [3] **DEEDS—PRESUMPTION OF DELIVERY.**—Where a deed is read in evidence without objection, it carries with it the presumption of delivery at its date.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge. Affirmed.

The facts are stated in the opinion of the court.

J. F. Ramage for Appellants.

A. H. Carpenter for Respondent.

BURNETT, J.—The action was brought to quiet title to forty-three acres of land in San Joaquin County. Defendant, Maud Lisenbee, who was married to Charles S. Lisenbee in 1912 and was his second wife, was the only serious contestant of plaintiff's claim. Her opposition is based primarily upon the contention that the land was community property, and that the conveyance to plaintiff was made to defraud her of her community rights. Twenty acres of the land in controversy were conveyed to Charles Rothwell Lisenbee, a son of Charles S. Lisenbee by a former wife, by a deed from A. S. Gunn and wife, on August 23, 1913. The remaining twenty-three acres were conveyed by the said Charles S. Lisenbee and Maud Irene Lisenbee to said son on April 17, 1915, and he conveyed both parcels to plaintiff for a valuable consideration on the thirtieth day of January, 1917. On May 22, 1915, the said Maud Lisenbee brought an action against her husband for divorce on the ground of cruelty. She was denied a decree for the reason that her testimony was not sufficiently corroborated, but on May 19, 1916, she was awarded a certain amount for maintenance, and on November 12, 1917, an execution was issued thereon. This was levied upon the property and by virtue thereof it was sold to one Floyd Klinger to satisfy said judgment.

Among the court's findings were the following: "That the title of the twenty-acre tract described in the complaint herein never at any time vested in Charles Samuel Lisenbee or Maud I. Lisenbee, his wife, and that the purchase price therefor was paid by Rothwell Lisenbee, and the conveyance of said realty was made to him for that reason," and "that the twenty-three acre tract described in the complaint herein was purchased by Charles Samuel Lisenbee with the proceeds derived from the sale of 320 acres of land in Calaveras County that had been his separate and individual property that he owned for more than twenty years prior to his marriage with the defendant Maud Irene Lisenbee, and that for that reason he could convey the title thereto without his said wife, Maud, joining in the conveyance thereof, and that if any fraud or threats were made or practiced, as alleged in

the defendant Maud I. Lisenbee's cross-complaint, the evidence thereof was wholly immaterial, and such allegations require no findings thereon, as they could not affect the plaintiff's title to the realty in controversy."

There is the additional finding: "That the deed from Charles and Maud Irene Lisenbee to Rothwell Lisenbee, dated April 17, 1915, was not without consideration, and all the allegations of fraud in the defendant Maud Irene Lisenbee's cross-complaint herein are untrue."

These conveyances to the son were prior to the beginning of said action for divorce, which culminated in the judgment for maintenance, and it is apparent that if said conveyances were and are valid, appellants are in no position to question the sufficiency of the conveyance to plaintiff.

As to the conveyance of the twenty-acre tract to the son, Charles S. Lisenbee testified: "I went there one Sunday; there was a gentleman told me, Mr. Robert's neighbor, said Mr. Roberts wanted to sell the place; he says, 'You can't see him unless you come here Sunday,' and I came Sunday to see him and brung Rothwell, my son, Charles Rothwell, with me, and Mr. Klinger went with me and went there and looked at the place; Rothwell said he wanted the place, for me to buy it for him, he would pay me for the place. He had a check-book of three thousand dollars of his own and several hundred dollars besides, that he says I could use in buying it. 'Well,' I says, 'son, no use of that, your money is on interest,' and I used my money I had off my place up yonder to buy it with, gave Mr. Roberts a check first." He testified further that he was repaid a portion of it by his son. However, it is unimportant whether he was repaid the purchase price or not. He testified positively that he paid for the land out of money he received for the sale of other land which he owned prior to his marriage with appellant Maud. He therefore had the legal right to make a gift of it to his son or to convey it to him upon his promise to repay the purchase price. As to this transaction it may be stated there is no evidence whatever of fraud, nor does it appear that the conveyance to the son was in trust for any purpose. It may be added that appellants made no attempt to show that any of the money with which the land was purchased was community property.

[1] Indeed, appellants rely as to that upon the presumption that property acquired during coverture is community in character. This presumption, however, was overcome in the opinion of the trial judge, by the positive testimony of the witness, and we must follow his finding.

[2] The character of the other tract must be likewise considered. The said Charles S. Lisenbee testified positively that it was purchased with money obtained from the sale of land belonging to him before his second marriage. No attempt was made to disprove this. While he seems to have quibbled to a certain extent, was, apparently, an ignorant and somewhat stupid witness, yet his testimony, if believed, is amply sufficient to support the finding of the lower court. It was undoubtedly believed and acted upon, and it is idle to ask an appellate court to set the finding aside because the circumstances may be somewhat suspicious and there may be some reason for believing that he was trying to defraud his wife.

If we concede that the deed of April 17, 1915, executed after his wife had left him, was the result of an intention to place his property beyond her reach, and that it might have been set aside on the ground of fraud, it can be of no avail to appellants, since the deed was not attacked on any such ground, but solely for the reason that the signature of Maud I. Lisenbee was obtained by duress. But, as already shown, this circumstance was immaterial in view of the fact that, upon sufficient evidence, the court found that the land was separate property of the husband.

It follows from the foregoing that appellants' claim of the insufficiency of the evidence to show the delivery of the deed from Rothwell Lisenbee to plaintiff is of no decisive moment. They were not creditors of either party and it is really of no legal concern to them whether or not the title became vested in respondent. [3] But, it may be said, the deed to plaintiff was read in evidence without objection, and it carried with it the presumption of delivery at its date, irrespective of any testimony in regard thereto. (*McGorry v. Robinson*, 135 Cal. 314, [67 Pac. 279].)

Moreover, there was positive evidence that it was delivered to the attorney for plaintiff at the latter's request and by the former filed for record in the recorder's office.

As to the consideration for the deed, if any be sought, the testimony is uncontradicted that plaintiff gave his promissory note for seven thousand dollars for the land and thereafter leased it to said Rothwell Lisenbee.

Counsel for appellant Maud I. Lisenbee complains bitterly of the treatment accorded her by her husband, but whatever justification there may be, on moral grounds, for condemnation of his conduct, there seems to be no doubt, from the record before us, upon well-established principles, that the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2817. First Appellate District, Division One.—April 24, 1919.]

**HELEN H. WARNER et al., Respondents, v. INA
BERTHOLF, Appellant.**

- [1] **NEGLIGENCE — CONFLICTING EVIDENCE — FINDINGS—APPEAL.**—In an action for damages for personal injuries sustained through having been struck by an automobile, the findings of the trial court based on conflicting evidence may not be disturbed on appeal.
- [2] **ID.—USE OF STREET BY PEDESTRIAN.**—A pedestrian has a right to the use of the street in the pursuit of her intention to board a street-car.
- [3] **ID.—DUTY OF PEDESTRIAN BOARDING STREET-CAR.**—Where a street-car which a person desires to board stops some distance beyond the customary stop-sign, such person, after she has once assured herself that no automobile or other vehicle is approaching on her side of the street, is not bound to continue looking behind her while walking along the street in order to board such car.
- [4] **ID.—DUTY OF AUTOMOBILE DRIVER.**—It is the duty of the driver of an automobile to see persons on the road in front of her where her view is unobstructed.

APPEAL from a judgment of the Superior Court of Alameda County. J. J. Trabucco, Judge Presiding. Affirmed.

The facts are stated in the opinion of the court.

Albert H. Elliot for Appellant.

Albert E. Carter and John D. Murphey for Respondents.

WASTE, P. J.—This is an appeal by the defendant from a judgment had by plaintiff for damages for personal injuries suffered when the plaintiff was struck by the automobile of the defendant.

As we read the record, it was stipulated by the attorney for the defendant that, if any judgment at all should be rendered or entered against the defendant, the judgment of six hundred dollars, awarded plaintiff in this case, is not excessive, and is proper so far as the amount of the damage is concerned.

Plaintiff was standing on the easterly side of College Avenue, in the city of Berkeley, intending to board a south-bound car, which she saw approaching on the westerly, or south-bound, track. She crossed the street in front of the approaching car, signaled the motorman to stop, and stood waiting for the car to pass. As she so stood, she looked northerly on College Avenue and saw no automobile or vehicle approaching. As the street-car passed her, it slowed down, then being some distance north of the customary stop-sign. It passed plaintiff, who turned and walked southerly along with the car. At this time she was midway between the side of the car and the westerly curb line of the street. She was facing and walking south and her back was to the north. While walking in this direction, she was suddenly struck in the back by the automobile of the defendant, and suffered the injuries complained of, and which resulted in the judgment which is brought here for review on this appeal.

[1] The testimony of the plaintiff, as to her position in the street at the time of the accident, and her movements just prior thereto, is corroborated in detail by the testimony of the motorman of the car, and by the conductor, as to the point in the street where she was struck.

According to the testimony of defendant and one of her witnesses, plaintiff stepped from the westerly curb of the street, directly in front of the approaching automobile. This conflict in the evidence was reconciled by the trial court, as it was its duty to do, and we cannot disturb its finding on that point. In view of the evidence, which the trial court

found to be true, we see no merit in this appeal. [2] The plaintiff had a right to the use of the street in the pursuit of her lawful intention to board the street-car. [3] We find no support in appellant's authorities, under the facts of this case, of the contention made here that it was the duty of the plaintiff, after she had once assured herself that no automobile or other vehicle was approaching, not to walk along and with the street-car without at all times looking behind her. (*Raymond v. Hill*, 168 Cal. 473, [143 Pac. 743].) [4] It was the duty of the defendant, in driving her automobile, to see persons on the road in front of her, where, as in this case, her view was unobstructed. (*Barker v. Savas* (Utah), 172 Pac. 672.)

The judgment is affirmed.

Richards, J., and Nourse, J., *pro tem.*, concurred.

[Civ. No. 2767. First Appellate District, Division Two.—April 25, 1919.]

CHARLES ADLER, Respondent, v. F. W. SAWYER,
Appellant.

- [1] CONTRACTS—PURCHASE OF NOTE—INDEMNITY AGAINST LOSS—CONSIDERATION—FINDINGS.—In an action upon an agreement made subsequent to the sale of a promissory note and its security whereby the defendant agreed to protect plaintiff against loss or damage arising from the sale thereof by defendant himself, it is not necessary to decide whether the contract sued upon is a contract of guaranty and supported by a sufficient consideration where it is found that the contract was supported by a sufficient consideration.
- [2] FINDINGS—CONFLICT—CONSTRUCTION OF.—The findings of the trial court are to be liberally construed in support of the judgment, and all the findings are to be read together. If possible, they are to be reconciled so as to prevent any conflict on material points.
- [3] JUDGMENT—REVERSAL—CONFLICTING FINDINGS.—A judgment will not be reversed on the ground of conflict in the findings unless the findings are incapable of being harmoniously construed.
- [4] PLEADING—ISSUE AS TO CONSIDERATION—FINDINGS—APPEAL—PRESUMPTION.—Even if the allegations of the complaint and answer in an action upon a contract do not raise the issue of the consid-

eration for the execution of the contract, upon an appeal on the judgment-roll alone, it must be presumed in support of the judgment of the trial court that the evidence by which the existence of a sufficient consideration was established was received without objection, and that the case was tried by consent of the parties as if such issue had been properly raised.

- [5] **CONTRACTS — INDEMNITY AGAINST LOSS ON PURCHASE OF NOTE—STATUTE OF LIMITATIONS.**—An agreement made subsequent to the sale of a promissory note and its security to protect the purchaser against any and all possible loss or damage that he might sustain by not being able to in any manner realize the full benefits of the note and security or to recover the full amount of said note is a contract of indemnity, rather than a contract of guaranty, and a right of action thereon does not accrue against the indemnitor until the person suffers the loss against which the contract protects him.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge. Affirmed.

The facts are stated in the opinion of the court.

F. W. Sawyer, *in pro. per.*, for Appellant.

Gerald C. Halsey for Respondent.

HAVEN, J.—Defendant appeals upon the judgment-roll alone from a judgment rendered against him in an action upon a written contract of indemnity. On August 18, 1911, in consideration of the payment of three thousand dollars, the defendant sold and transferred to plaintiff a certain promissory note in that amount, dated July 17, 1909, the payment of which was secured by a deed of trust. On September 22, 1911, defendant executed and delivered to plaintiff the contract sued upon. That document recites the prior sale of the note to the plaintiff, the receipt of the consideration by the defendant, the fact that statements had been made as to the possible invalidity of the note, and concludes as follows: "Said F. W. Sawyer hereby agrees to protect said Charles Adler against any and all possible loss or damages that he may sustain by not being able to in any manner realize the full benefits of note and trust deed or to recover the full amount of said note and trust deed from any reason, whatever, arising out of the transaction."

Appellant contends that this contract is one of guaranty and, as such, it is unsupported by a sufficient consideration, for the reason that it was not entered into at the same time as the original obligation and did not form a part thereof, and that the record shows there was no distinct consideration therefor as required by section 2792 of the Civil Code. The argument is based upon the allegations of the complaint and the findings, a portion of which are set forth in appellant's brief. The full record on this matter is as follows:

In the complaint it is alleged: "That subsequent to the transfer of the said note and of the said deed of trust by the said defendant F. W. Sawyer to the said plaintiff Charles Adler above mentioned and alleged, said defendant F. W. Sawyer and the said plaintiff Charles Adler entered into a certain agreement in writing, wherein and whereby for the original consideration paid by the said Charles Adler to the said defendant F. W. Sawyer for the transfer of the said note and of the said deed of trust and for other reasons expressed therein, the said defendant F. W. Sawyer agreed to protect the said Charles Adler against any and all possible loss for damage that he might sustain," etc. In his answer the defendant denies: "That the alleged agreement in said complaint alleged to have been entered into between Charles Adler and defendant F. W. Sawyer, was entered into for any other consideration than is expressed in said agreement." Upon this issue the court found: "That all of the allegations of plaintiff's complaint on file herein are and each of them is true and correct, and fully sustained by the evidence, and the court further finds that there was a good and sufficient and valuable consideration for the making and execution and delivery of all of the written instruments particularly described in plaintiff's complaint." (The contract sued upon was one of the instruments thus referred to.) "And the court further finds that the defendant, Sawyer, for a good and sufficient and valuable consideration on the twenty-second day of September, 1911, agreed to protect plaintiff against any and all possible loss or damages that plaintiff might sustain by not being able to in any manner realize the full benefits of the note and trust deed described in plaintiff's complaint, or to recover the full amount of said note and trust deed from any reason whatever."

[1] A guaranty is defined as "a promise to answer for the debt, default, or miscarriage of another person." (Civ. Code, sec. 2787.) In the contract here involved defendant agreed to protect plaintiff against loss or damage arising from the sale by defendant himself of the promissory note and its security. Section 2792 of the Civil Code is applicable to contracts of guaranty only. Upon the question of consideration, it is not necessary to decide whether the contract sued upon comes within that category. Even if it be assumed that the section relied upon applies to this particular contract, the contention of appellant is without merit.

[2] The findings of the trial court are to be liberally construed in support of the judgment, and all the findings are to be read together. If possible, they are to be reconciled so as to prevent any conflict on material points. [3] A judgment will not be reversed on the ground of a conflict in the findings unless the findings are incapable of being harmoniously construed. (*Ames v. City of San Diego*, 101 Cal. 390, 395, [35 Pac. 1005]; *Haight v. Haight*, 151 Cal. 90, 92, [90 Pac. 197].) So reading and construing the findings before us, it is clear that the court found that the contract sued upon was supported by a good and sufficient and valuable consideration, and that there is no such conflict in the findings as to lead to a reversal of the judgment. The allegations of the complaint and answer raised the issue of the consideration for the execution of the contract. [4] But, even if they did not, upon this appeal on the judgment-roll alone, it must be presumed in support of the judgment that the evidence by which the existence of a sufficient consideration was established was received without objection, and that the case was tried by consent of the parties as if such issue had been properly raised. (*Churchill v. Baumann*, 95 Cal. 541, 547, [30 Pac. 770].)

[5] It is further contended by the appellant that the action is barred for the reason that the contract was dated September 22, 1911, and this action was not commenced until July 6, 1917. The contract sued upon is not a guaranty of payment of the promissory note transferred by defendant to plaintiff, but is, rather, a contract of indemnity against loss by reason of the inability of the plaintiff to realize upon the note and the security therefor. There is a marked difference between these two classes of contracts. Under a guar-

anty of payment, the liability of the guarantor becomes fixed by the failure of the principal debtor to pay at maturity; but under a contract of indemnity against loss, no right of action accrues against the indemnitor until the person indemnified suffers the loss against which the contract protects him. In this case the plaintiff's cause of action against the defendant upon the contract arose when it was determined that plaintiff would not recover the full amount of the transferred note. In the absence of any evidence, we are unable to determine when this loss occurred and plaintiff's right of action accrued. The trial court found, however, that plaintiff's cause of action was not barred by any of the provisions of the Code of Civil Procedure relied upon. It must be presumed that this finding was sustained by sufficient evidence.

The judgment is affirmed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 23, 1919.

[Civ. No. 2759. First Appellate District, Division Two.—April 25, 1919.]

MANUEL A. PEIXOUTO, Appellant, v. F. A. PEIXOUTO
et al., Respondents.

- [1] **CONTRACTS — ORAL AGREEMENT TO MAKE GIFT OF LAND — SPECIFIC PERFORMANCE.**—An oral contract to make a gift of land, followed by possession on the part of the donee and the making of valuable improvements thereon in reliance upon such agreement, is sufficient to justify a decree of specific performance on the part of the donor, or the party standing in his place with notice of the rights of the donee, where the property covered by the contract is fully identified.
- [2] **ID.—FULL PERFORMANCE BY VENDEE — RUNNING OF STATUTE OF LIMITATIONS.**—When there exists a contract to convey land and the vendee has fully performed and nothing remains to be done on his part, the vendor and those who take the land with knowledge of the vendee's rights then hold the bare legal title in trust for the benefit of the vendee; and while the *cestui que trust* is in possession, the statute of limitations will not run against him.

- [3] **ID.—REPUDIATION OF TRUST—RUNNING OF STATUTE OF LIMITATIONS.** In such a case, if the trustee wishes to start in operation the statute of limitations, he must in some way repudiate the agreement and *must take possession*, either in person or by agent, in order to break the relation his vendee sustained to him under the agreement before the statute will commence to run. Mere notice that the agreement is terminated and that the vendor desires possession is not sufficient.
- [4] **ID.—ENFORCEMENT OF CONVEYANCE BY CESTUI QUE TRUST.**—In such a case, the *cestui que trust*, having the equitable title, is entitled to enforce a conveyance of the naked legal title as an incident to such equitable ownership. As long as the equitable title exists, it must exist with all its incidents.
- [5] **ID.—ACTION TO COMPEL SPECIFIC PERFORMANCE — CONSIDERATION—PLEADING.**—In an action in equity to compel the specific performance of an oral agreement to make a gift of land, it is not necessary that the plaintiff allege in express language that the defendant received a valuable consideration, but only that he set out the facts and the value of the lands and that it affirmatively appear therefrom that the consideration was adequate.
- [6] **ID.—ORAL AGREEMENT TO MAKE GIFT—STATUTE OF FRAUDS.**—Such a contract to make a gift of land need not be in writing where it has been partly performed and valuable improvements have been made upon the property.

APPEAL from a judgment of the Superior Court of Alameda County. William H. Waste, Judge. Affirmed.

The facts are stated in the opinion of the court.

B. C. Mickle and Dixon L. Phillips for Appellant.

Peter J. Crosby and Stanley R. Sterne for Respondents.

LANGDON, P. J.—This action was brought to quiet title to certain land in the county of Alameda. The defendant, F. A. Peixouto, filed an answer and cross-complaint in which he set up an oral contract between the plaintiff's grantor and himself by which the plaintiff's grantor agreed to convey to defendant a small portion of the land to which plaintiff sought to quiet his title. The facts set up in the answer and cross-complaint are substantially as follows: That the plaintiff and defendant F. A. Peixouto are brothers; that Frank A. Peixouto, Sr., is the father of the plaintiff and said de-

fendant; that in 1912 the said Frank A. Peixouto, Sr., was the owner and in possession of all the land described in plaintiff's complaint; that for a long time prior thereto the defendant had worked for his said father in and about said tract of land, and that in April, 1912, the father promised the defendant, orally, that if the defendant would build upon, live upon and improve a certain portion of said land, that the father would give and convey to the said defendant such portion; that in pursuance of said agreement the said Frank A. Peixouto, Sr., measured and marked off the boundaries of said portion; that thereafter the defendant, in reliance upon said promise and agreement, entered into possession of the said portion of land and erected thereon a dwelling-house of the value of seven hundred dollars and expended the further sum of three hundred dollars in improving and fencing the land; that ever since April, 1912, the defendant has continued in open, notorious, and exclusive possession of said portion of the tract of land described in plaintiff's complaint; that the said Frank A. Peixouto, Sr., neglected and refused to grant and convey said portion of said land to defendant, and later conveyed the entire tract to the plaintiff; that the conveyance was made to the plaintiff without any valuable consideration, and while the defendant was in open and visible possession of a part of the same, and at a time when all the facts relating to the agreement between the defendant and his father were well known to the plaintiff herein. Defendant asked that the plaintiff be ordered and directed to execute and deliver to the defendant a deed and conveyance of that portion of the land described in the complaint which was included in the oral contract between the defendant and his father. The plaintiff denied substantially all the allegations of the cross-complaint. Judgment was given quieting title in the plaintiff to the land described in the complaint, excepting that portion thereof set out in the cross-complaint of defendant; and as to that portion, judgment was given for the defendant, decreeing that the plaintiff holds the legal title thereto in trust for said defendant and cross-complainant, and that the said plaintiff execute to the defendant a good and sufficient deed therefor, and upon his failure so to do, within thirty days, a commissioner named execute and deliver such deed, which shall operate as a transfer from the plaintiff to

the defendant of the property described therein; and that the plaintiff be enjoined from asserting any right in the said portion of the property held in trust for the defendant. From the latter portion of the judgment, the plaintiff appeals.

Appellant first contends that the pleading and proof does not show a contract sufficiently certain and unambiguous in its terms to warrant specific performance, and particularly for the reason that, as he asserts, there is no evidence that respondent has performed, or fully performed, because the alleged oral agreement was so indefinite and uncertain as to time and terms of performance by defendant that it would be impossible to say what year, month, or day performance was to be completed. The point made by appellant is that it is impossible to determine when the defendant was to build or complete his house. This matter can be of no importance here, because the house has been built and completed, and that side of the contract has been fulfilled. In so far as the part of the contract to be performed by the defendant is concerned, he alleged and proved that he fully performed all things to be by him performed. The contract alleged and proven does not disclose that there was a time-limit placed upon his building of the house, and therefore time not being made of the essence of the contract, so far as the evidence discloses, it becomes immaterial just when he did complete the work. He has completed it in accordance with the contract found to exist by the court, and the date of the completed performance can be of no moment except in regard to the point raised by the appellant that the statute of limitations is applicable to defendant's claim, which contention will be considered hereafter.

[1] The cross-complaint sets forth an oral gift of land, followed by possession on the part of the donee and the erection of valuable improvements. The property covered by the alleged oral contract is fully identified, and was located and staked out and agreed upon by the parties. The complaint states, the evidence clearly establishes, and the court found that the defendant, in reliance upon such agreement, went upon the property, erected a home thereon, and improved and cultivated the land and has been in possession of the same ever since. This is sufficient to justify a decree of specific performance as against the donor or the party standing

in the place of the donor with notice of the rights of the cross-complainant. (*Magee v. Magee*, 174 Cal. 276, [162 Pac. 1023].) Contracts to convey land, under such circumstances, have always been enforced in this state! (*Burlingame v. Rowland*, 77 Cal. 315, [1 L. R. A. 829, 19 Pac. 526]; *Manly v. Howlett*, 55 Cal. 94; *Bakersfield T. H. Assn. v. Chester*, 55 Cal. 98; *Anson v. Townsend*, 73 Cal. 415, [15 Pac. 49]; *Kinsell v. Thomas*, 18 Cal. App. 683, [124 Pac. 220].) The evidence as to the existence of the contract to convey is conflicting, but the finding is that such an agreement was made and that finding cannot be disturbed by this court, as the evidence of the defendant and of his witnesses is sufficient to warrant it. We think that the contract alleged and proven is not lacking in certainty nor too indefinite for a court of equity to enforce.

[2] The main question in the case is as to the application of the statute of limitations. It is admitted that defendant completed the house and other improvements some time in 1912, and appellant contends that defendant's claim accruing when he had performed the things to be by him performed, is now barred by the statute of limitations, the cross-complaint not having been filed until October, 1916. We think there is no merit in this contention. When there exists a contract to convey land and the vendee has fully performed and nothing remains to be done on his part, the vendor then holds the legal title in trust for the benefit of the vendee. Defendant having shown by his proof, and the court having found that the plaintiff in this case took the land with knowledge of the defendant's rights, the plaintiff would be in the same position as his grantor and would be holding the bare legal title in trust for the defendant. Under such circumstances, while the *cestui que trust* was in possession, the statute of limitations would not run as against him. (*Gilbert v. Sleeper*, 71 Cal. 290, [12 Pac. 172]; *Love v. Watkins*, 40 Cal. 547, [6 Am. Rep. 624]; *Beebe v. Dowd*, 22 Barb. (N. Y.) 255; *Lakin v. Sierra B. G. M. Co.*, 25 Fed. 337; *Fleishman v. Woods*, 135 Cal. 256, [67 Pac. 276]; *Scadden etc. Co. v. Scadden*, 121 Cal. 33, [53 Pac. 440]; *Smith v. Matthews*, 81 Cal. 120, [22 Pac. 409].)

[3] We are not unmindful of the argument made by appellant that the notice given by Frank A. Peixouto, Sr., to the defendant that the agreement was terminated and that

he desired the defendant to surrender to him the possession of the property, served upon December 1, 1913 (which was after the defendant had fully performed, and while defendant was in the undisputed possession of the property), was such a repudiation as would set the statute in operation, even as against a *cestui que trust*. With this contention we cannot agree. It was said in the case of *Bennett v. Morrison*, 120 Pa. St. 390, [6 Am. St. Rep. 711, 14 Atl. 264], and the language is quoted with approval in the case of *Luco v. De Toro*, 91 Cal. 405, [18 Pac. 866, 27 Pac. 1082], that if the trustee wishes to start in operation the statute of limitations, he must in some way repudiate the agreement and *must take possession*, either in person or by agent, in order to break the relation his vendee sustained to him under the agreement before the statute will commence to run. So in the present case, we apprehend that even though the vendor had taken possession of the property, in addition to that possession, he would have had to bring home to the vendee, as in the case of tenants in common, knowledge that he thereafter denied his right to possession in order to rely upon the bar of the statute; and, clearly, notice of the denial of the vendee's title, while the vendee was in undisputed possession, would have no effect whatever.

In the case of *Rush v. Barr*, 1 Watts (Pa.), 110, the language of which is quoted with approval in *Luco v. De Toro*, *supra*, the court said: "Whenever the legal title is in one, and the real interest in another, these form but one title, and the statute does not run between them until the trustee disclaims and *acts adversely to the cestui que trust*. . . . And so in all cases where two persons have each an interest in a tract of land of such kind that both their interests form but one title, and by their agreement one is to possess for his own use and the use of the other. In such cases the statute does not run until *he in possession* disclaims the right and interest of the other—denies his right and refuses possession—and such disclaimer and denial must be such that the other has notice of it."

It is true that in some portions of the opinion in the case of *Love v. Watkins*, *supra*, cited by appellant, there is language that would indicate, if taken without any connection with the facts under discussion, that notice of adverse claim is sufficient to start the statute in operation; but we believe

it will be found upon an examination of that case and of other cases cited that where such language is used, it is used in relation to the particular facts of the case—and that those facts were that the one giving the notice was also in possession, or, at least, that the vendee himself was not in possession when the notice was given. If the vendor has possession, then, assuredly, it is only necessary for him to give notice of holding such possession adversely. Our conclusion seems evident from the quotations from cases contained in appellant's own brief. He quotes from the case of *Love v. Watkins, supra*, in which the court refers to the case of *Harris v. King*, 16 Ark. 122, and states that in that case "it was held that a vendor who had received the purchase money became the trustee of the vendee, and although *actually in possession* of the land, held the naked legal title in trust for him, and the statute of limitations was no bar to an action for specific performance of the contract if the vendor had done no act inconsistent with the vendee's title, *other than simply holding possession*."

As was said in the case of *McCauley v. Harvey*, 49 Cal. 497: "A person all the while in possession according to his right, cannot, while holding the possession, be divested of that right in favor of another. If authority be needed in support of a proposition so self-evident, it may be found in *Love v. Watkins*, 40 Cal. 547." The case of *Fleishman v. Clark*, 135 Cal. 356, [67 Pac. 276], is to the same effect. There has been no dispute in the cases following *Love v. Watkins*, as to the holding of that case. That case has been quoted as authority for the proposition that the statute will not begin to run so long as the purchaser is in possession, in the following cases: *Gilbert v. Sleeper*, 71 Cal. 290, [12 Pac. 172]; *Fleishman v. Woods, supra*; *Scadden etc. Co. v. Scadden*, 121 Cal. 33, [53 Pac. 440]; *Fogarty v. Fogarty*, 129 Cal. 46, 49, [61 Pac. 570]; *Smith v. Matthews*, 81 Cal. 120, [22 Pac. 409]; *Luco v. De Toro*, 91 Cal. 405, [18 Pac. 866, 27 Pac. 1082]; *McCauley v. Harvey*, 49 Cal. 497. "Possession draws to it, or rather extinguishes all adverse claims and titles." (*Love v. Watkins, supra*.) Both upon principle and the weight of authority, it is necessary for us to hold in this case that no statute of limitations is applicable to the right which defendant is asserting in his cross-complaint. So far as equity is concerned, defendant was the absolute owner of

an indefeasible estate and the vendor was a naked trustee having no interest, but charged with the simple duty of conveying to the vendee upon demand. Equity regards the vendee as the owner, upon the principle that it considers that as done which ought to be done. Defendant, therefore, could not be divested of his indefeasible estate while he was in possession, by anyone out of possession. The owner of the equitable title is supposed, for the purposes of a court of equity, to have acquired and to hold the title, and the court will compel the conveyance of the legal title only because the equitable title is not recognized in a court of law; but where it is recognized, it constitutes ownership, and it cannot be lost by the bar of the statute while the owner is in actual possession and enjoyment of his estate. (*Love v. Watkins, supra.*) [4] Since the defendant could not be divested of his title by the operation of the statute, it follows that, having the equitable title, he is entitled to enforce a conveyance of the naked legal title as an incident to such equitable ownership. As long as the equitable title exists, it must exist with all its incidents.

[5] Appellant contends that there is no allegation in the cross-complaint that the plaintiff has received an adequate consideration for the contract. It is not necessary that such allegation should be in express terms. It is sufficient if the cross-complaint set out the facts and the value of the land and it affirmatively appear therefrom that the consideration was adequate. (*Magee v. Magee*, 174 Cal. 276, [162 Pac. 1023].) In the numerous cases cited herein covering contracts similar to the one found by the trial court to exist in this case, it has been held that under facts very similar there existed a sufficient consideration to warrant specific performance. The case of *Burlingame v. Rowland*, 77 Cal. 315, [1 L. R. A. 829, 19 Pac. 526], presents a very similar state of facts.

[6] The objection that the contract should have been in writing is without merit. The contract had been partly performed and the making of the improvements upon the property is sufficient to take it without the statute of frauds.

The judgment is affirmed.

Brittain, J., and Haven, J., concurred.

[Civ. No. 2657. First Appellate District, Division One.—April 26, 1919.]

**ARTHUR T. JOHNS, Respondent, v. CHARLES L.
BAENDER et al., Appellants.**

- [1] **FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE TRANSFER—SUFFICIENCY OF COMPLAINT—WAIVER OF OBJECTION.**—In an action to vacate and set aside a conveyance of real property alleged to have been made to obstruct and prevent plaintiff from satisfying a certain money judgment theretofore obtained against two of the defendants, if the allegations of the complaint do not definitely show that the conveyance was made in such manner and under such circumstances as to show its fraudulent intent, but the demurrer thereto is general and no objection is urged to the evidence introduced to establish the fraud, on appeal from the judgment the point must be deemed to have been waived.
- [2] **ID.—DEFAUDING CREDITORS—CONVEYANCE VOID.**—If a conveyance be made with the intent to defraud creditors, it is void, notwithstanding that the debtor has other property ample in amount to satisfy his creditor.
- [3] **APPEAL—POINT RAISED FOR FIRST TIME—CONSIDERATION OF.**—A point raised for the first time in the appellate court upon oral argument may not be considered.
- [4] **FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE TRANSFER—EVIDENCE—ADMISSIBILITY OF DIVORCE COMPLAINT.**—In an action to set aside a conveyance alleged to have been made with the intent to prevent plaintiff from satisfying a judgment theretofore obtained, a divorce complaint filed by one of the judgment debtors wherein the property alleged to have been thus fraudulently conveyed is alleged to be community property of herself and husband, the other judgment debtor, is not privileged; and where it is admitted in evidence without objection, said defendants cannot on appeal be heard to complain of its admission.

APPEAL from a judgment of the Superior Court of Alameda County. J. J. Trabucco, Judge Presiding. **Affirmed.**

The facts are stated in the opinion of the court.

C. R. Baender and L. W. Jefferson for Appellants.

St. Sure & Rose for Respondent.

KERRIGAN, J.—This is an appeal from a judgment against defendants in an action instituted by the plaintiff

to vacate and set aside a conveyance of real property alleged to have been made to obstruct and prevent plaintiff from satisfying a certain money judgment which he had theretofore obtained against the defendants, Charles L. Baender and Lillie M. Baender, his wife.

The evidence abundantly supports the finding that the conveyance of the property here assailed was made to defraud, hinder, and delay the collection of plaintiff's claim.

It appears from the record that in the latter part of the year 1908 the defendants, Charles L. Baender and his wife, had falsely represented in several material respects a certain business transferred by them to the plaintiff in consideration of a conveyance of real property, by reason of which misrepresentations plaintiff in the month of June, 1910, obtained judgment against said defendants, which he now seeks to satisfy out of the property described in the complaint, the ownership of which in defendants arises from the original transfer to them by plaintiff of the real property above referred to as the consideration for plaintiff's acquisition of said business, and which, with the intent of concealing their ownership thereof, they transferred to Charles P. Baender, the father of the defendant Charles L., who subsequently conveyed the same to R. M. Meeker. It appears that later it was exchanged for what is called in the record the Fruitvale lot, which in turn was exchanged for the property described in the complaint, and that the deed thereto was taken in the name of the mother of Charles L. Baender, in whom the record title remained until it was conveyed to defendant Niels Gostave, which conveyance was made for the purpose of enabling Gostave to qualify as a bondsman for said Charles L. Baender, at that time charged with the offense of grand larceny.

After obtaining the first judgment plaintiff caused an execution to issue thereon, but neither by this means or in any other way was he able to collect the amount thereof, not learning of his debtor's interest in the real property concerned in this action until early in the year 1915, when Lillie M. Baender commenced an action for divorce against her husband, and alleged in her complaint that it was the community property of herself and husband.

It is also in evidence that shortly after the commencement of the divorce proceeding Charles M. Baender met the plain-

tiff one day, and tried to effect with him a compromise of his claim. On that occasion Baender not only admitted that he had obtained the first conveyance by fraud, but also that the title to the property here involved was taken in the name of his relative, as already mentioned, for the purpose of obstructing and defeating any claim which the plaintiff had or might have against him and his wife. It further appears that Charles L. Baender and wife were at all times in possession of the property, paid the taxes thereon, and expended money for its repair and improvement, but paid no rent therefor.

The testimony on behalf of the defendants was weak, evasive, and unsatisfactory. The case shows plain indications of fraud.

[1] Defendants, in support of their appeal, urge that this being an action in equity to set aside a transfer of property on the ground of fraud, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to show its fraudulent intent, and accordingly that it must appear that at the time it was made, and also when this action was commenced, said defendants had no other property subject to execution out of which the plaintiff's judgment could be satisfied, citing *Albertoli v. Branhams*, 80 Cal. 631, 634, [13 Am. St. Rep. 200, 22 Pac. 404]. Assuming for the moment that appellants' position is sound, still we are of the opinion that the most that can be said against the complaint in this regard is that it is somewhat indefinite; but as the demurrer was general, and as there was no objection to the evidence introduced to establish the fraud on the ground now urged, the point must be deemed to have been waived, and is now unavailing (*Sukeforth v. Lord*, 87 Cal. 399, 403, [25 Pac. 497]). [2] Moreover, the case on which appellants depend appears to have been overruled; and according to later cases, if a conveyance be made with the intent to defraud creditors it is void, notwithstanding that the debtor has other property ample in amount to satisfy his creditor. (*First Nat. Bank of L. A. v. Maxwell*, 123 Cal. 360, 371, [69 Am. St. Rep. 64, 55 Pac. 980]; *Bekins v. Dieterle*, 5 Cal. App. 690, 694, [91 Pac. 173].)

Defendants also assert that the decree rendered in the present suit goes beyond the issues framed by the pleadings and the prayer, by declaring in effect a second judgment

against them arising out of the same cause of action. It is true that a portion of the judgment if detached from the remainder seems to be open to the objection urged by defendants, but we think it sufficiently clear that when the judgment is read in its entirety, the part objected to amounts to no more than a recital of the amount due to plaintiff on account of the former judgment, and for which the plaintiff is given a lien on the property here involved. [3] But aside from this, the point was made for the first time upon oral argument, and may not for that reason be considered.

The appellants also contend that even if the transfer of the property were fraudulent, the title of the grantee is good as against all the world except this creditor, and that the court could not deprive the grantee of the title so conveyed to her, but that the judgment should have subjected the property to the lien of the judgment, and directed that any surplus which might remain after sale be paid to the grantee. The court under the issues found a certain amount due plaintiff, and having also found that the transfers already referred to were void as to plaintiff, impressed the property with the lien of his judgment, directing that it be sold in satisfaction of that judgment. To this much under the issue the plaintiff was clearly entitled. As to what may or should be done with any possible surplus is a matter with which under the pleadings we are not now concerned.

[4] The divorce complaint of Lillie M. Baender against her husband having been filed was not privileged; and, moreover, as it was admitted in evidence without objection said defendants cannot now be heard to complain of its admission.

The record as amended on suggestion of diminution thereof shows that the default against defendant Niels Gostave, sued as First Doe, was valid. Nor did the court err in ordering judgment against him.

No other point urged by appellants requires consideration. The judgment is affirmed.

Waste, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 23, 1919.

All the Justices concurred except Lawlor, J., and Lennon, J., who were absent.

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APPEAL.

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its alleged statement of facts is based, the briefs will not be considered. (Whiting-Mead Com. Co. v. Richards, 266.)

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APPEAL (Continued).

Civil Procedure, therefore, in order that the objection may be urged on appeal, an exception must be taken at the time the decision is made. (*Davies v. Ramsdell*, 424.)

22. **JUSTICE'S COURT APPEAL—HOW TAKEN.**—An appeal from a justice's court is taken by filing a notice thereof with the justice and serving a copy thereof upon the adverse party, but is not effectual for any purpose unless an undertaking be filed. (*Farrisee v. Superior Court*, 469.)
23. **TRANSFER OF JURISDICTION.**—When the appellant, on an appeal from a judgment rendered in a justice's court, has filed and given the notice of appeal and filed the undertaking, as required by the code, the justice is divested of all jurisdiction in the matter other than, as required by section 977 of the Code of Civil Procedure, and subject to the payment of his fees, to transmit the record to the clerk of the superior court for further proceedings. (*Id.*)
24. **JURISDICTION OF SUPERIOR COURT—HOW DIVESTED.**—On such appeal, the jurisdiction of the superior court attaches upon the perfecting of the appeal by the filing of the undertaking, and having once attached, can only be divested by an order of dismissal or some other act of that court. (*Id.*)
25. **JUSTIFICATION OF SURETIES—DISMISSAL OF APPEAL—CONSTRUCTION OF CODE.**—While section 978a of the Code of Civil Procedure provides that where an exception to the sufficiency of the sureties is interposed, they must justify within five days thereafter, otherwise the appeal must be regarded as if no such undertaking had been given, this does not, *ipso facto*, affect the appeal, the perfecting of which has vested jurisdiction of the case in the superior court, but the provision is to be construed as giving to the respondent the right, if he shall choose to avail himself thereof, to move for its dismissal upon the ground that since it was taken it has become ineffectual. (*Id.*)
26. **FAILURE OF SURETIES TO JUSTIFY—SECOND ATTEMPTED APPEAL INEFFECTIVE.**—Where, on an appeal from a judgment rendered by a justice's court, the sureties upon the undertaking, in response to exception to their sufficiency, fail to justify, the superior court has no jurisdiction other than to dismiss the appeal, notwithstanding that before the expiration of the time within which the sureties might qualify and while the first appeal is operative, a second notice of appeal and undertaking thereon are filed. (*Id.*)
27. **SETTLEMENT OF ADDITIONAL TRANSCRIPT—AUTHORITY OF TRIAL COURT.**—When a reporter's transcript to be used on appeal from a judgment has been regularly allowed and settled by the trial judge, the court's duty as well as its authority to settle a transcript has been exhausted, and thereafter the appellant is not entitled in the ordinary course of procedure to demand the settlement of an

APPEAL (Continued).

additional statement based upon the reporter's certificate to the correctness of a document containing matter additional to that contained in the settled transcript. (*Lapique v. Superior Court*, 582.)

28. **ALTERNATIVE METHOD—SECTION 953c, CODE OF CIVIL PROCEDURE, CONSTRUED.**—Section 953c of the Code of Civil Procedure, governing the taking of appeals under the alternative procedure, is positive in its requirements. (*City Street Improvement Co. v. Silver-shield*, 597.)
29. **CONFLICTING EVIDENCE—UNWARRANTED PROCEEDING.**—Where the evidence is clearly conflicting, and there is ample evidence to justify the verdict of the jury, an appeal from the judgment is an unnecessary and unwarranted proceeding, in the absence of some error occurring at the trial. (*Pozzi v. Alpine Evaporated Cream Co.*, 598.)
30. **FIRE INSURANCE—PREPONDERANCE OF EVIDENCE—PROVINCE OF APPELLATE COURT.**—Whatever the justices of the appellate court may think as to the preponderance of the evidence, they may not substitute their opinion for that of the jury wherever there is a fair, reasonable ground for a difference of opinion. (*Lutge v. Dubuque Fire etc. Ins. Co.*, 658.)
31. **CONFLICTING EVIDENCE—VERDICT.**—In this action to recover upon a fire insurance policy which the defendant company claimed had been canceled at the time it settled the claim for a previous fire on the premises, the evidence was such that the appellate court could not hold that there was no substantial conflict in the evidence, or that the jury rendered a verdict which was unsupported by the evidence. (*Id.*)
32. **JUDGMENT—ALLOWANCE OF INTEREST—MODIFICATION ON APPEAL.**—On appeal from the judgment in such an action, the appellate court has power to make an order remanding the cause with directions to the trial court to modify the judgment by including interest on the amount of the judgment, provided plaintiff is entitled to such interest and has not by some act of his own estopped himself from seeking such relief. (*Conlin v. Southern Pacific R. R. Co.*, 743.)
33. **IMPOSITION OF TERMS—ACCEPTANCE—IMPLIED ACQUIESCENCE.**—As a general rule, if a trial court imposes terms as the condition upon which any order will be granted, or any other thing done or not done, and the party upon whom the terms are imposed accepts them, he will be deemed to have acquiesced in the ruling and cannot afterward question its validity in the appellate court. (*Id.*)
34. **MOTION FOR NEW TRIAL—CONDITIONAL ORDER GRANTING—ACCEPTANCE OF REDUCED JUDGMENT—WAIVER OF RIGHT TO APPEAL.**—Where a motion for a new trial is granted to go into effect unless

APPEAL (Continued).

plaintiff stipulates to reduce the verdict, in which event the motion is denied, plaintiff by giving the stipulation and entering judgment thereon waives his right to appeal, although he entered the *remittitur* under protest and the court may have been wrong in finding that the judgment was excessive. (Id.)

35. **ACCEPTANCE OF BENEFITS—RIGHT TO APPEAL—WHEN NOT INCONSISTENT.**—The right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but are wholly inconsistent, and an election of either is a waiver and renunciation of the other. It is only in case there is no controversy as to a party's right to the amount for which the judgment was given, but he claims to be entitled to a greater amount, that he may accept the fruits of such order or judgment and appeal therefrom. (Id.)

36. **FINDINGS—SUSPICIOUS CIRCUMSTANCES.**—It is idle to ask an appellate court to set a finding aside because the circumstances may be somewhat suspicious and there may be some reason for believing that plaintiff's predecessor was trying to defraud his wife. (*Lisenbee v. Lisenbee*, 772.)

37. **PLEADING—ISSUE AS TO CONSIDERATION—FINDINGS—PRESUMPTION.**—Even if the allegations of the complaint and answer in an action upon a contract do not raise the issue of the consideration for the execution of the contract, upon an appeal on the judgment-roll alone, it must be presumed in support of the judgment of the trial court that the evidence by which the existence of a sufficient consideration was established was received without objection, and that the case was tried by consent of the parties as if such issue had been properly raised. (*Adler v. Sawyer*, 778.)

38. **POINT RAISED FOR FIRST TIME—CONSIDERATION OF.**—A point raised for the first time in the appellate court upon oral argument may not be considered. (*Johns v. Baender*, 790.)

See Criminal Law, 11, 18, 21, 22, 29; Divorce, 3, 7, 16, 17, 25, 31; Evidence, 2, 3, 8, 10, 12, 13; Fraudulent Conveyances, 2, 4; Judgments, 9, 12, 15, 16; Leases, 3; Mortgages, 4; Negligence, 14, 30, 34; Receivers, 2, 3; Street Law, 7, 8, 14; Vendor and Vendee, 3.

ARGUMENT. See Criminal Law, 19.

ASSESSMENTS. See Municipal Corporations, 3-5; Street Law, 13-15.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **FAILURE TO COMPLY WITH CODE SECTIONS—HOW FAR VALID.**—An assignment for benefit of creditors, though failing to comply with all the requirements of a statutory assignment prescribed by sec-

ASSIGNMENT FOR BENEFIT OF CREDITORS (Continued).

tions 3449 to 3473 of the Civil Code, is valid as against the assignor and all creditors assenting to it, and serves to vest the assignor's title to the property in the assignee. It is, at most, void only against creditors not assenting thereto and against purchasers and encumbrancers in good faith and for value. (*Garn v. Thorwaldson*, 62.)

2. **WHEN VALID.**—In the case at bar an assignment from an oil company to the plaintiff was a valid assignment for the benefit of the company's creditors, and divested the company of all title in and to the real and personal property thereby transferred. (*Id.*)
3. **LACK OF IMMEDIATE DELIVERY AND CHANGE OF POSSESSION.**—An assignment for the benefit of creditors is not void under section 3440 of the Civil Code for lack of immediate delivery and change of possession, since that section is expressly made inapplicable to assignments for the benefit of creditors. (*Id.*)

ASSIGNMENTS. See Account Stated, 7; Courts; Landlord and Tenant, 11; Promissory Notes, 1.

ASSUMPSIT. See Account Stated, 2, 6.

ATTORNEY AT LAW.

1. **CONTINGENT FEE—CONTRACTS BETWEEN ATTORNEYS—EVIDENCE.**—In this action between four attorneys involving their rights to share in a contingent fee, the undisputed evidence shows that the plaintiff, the cross-complainant and two defendants (four attorneys in all) were associated together for one client throughout a litigation and that each performed such services as were required of him. (*Ford v. Freeman*, 221.)
2. **ATTORNEYS ENGAGED IN SAME LITIGATION—OMISSION OF COURT TO FIND.**—Attorneys who jointly undertake to prosecute or defend a lawsuit are entitled, in the absence of an express agreement to the contrary, to share equally in the compensation, and it therefore follows that the trial court should have found, either that there was an express agreement between these four attorneys as to an equal division of the contingent fee or else the court should have found as a fact that there was no agreement whatever between them upon the subject of fees, in which case the court should have found as a legal result the existence of an implied agreement growing out of their common venture for an equal division of whatever their share in the recovery might be. In either event the defendants would not have been entitled to a judgment in their favor. (*Id.*)
3. **COLLECTION OF MONEY DUE CLIENT—DUTY OF ATTORNEY.**—It is the plain duty of an attorney to notify his client with reasonable diligence of the collection by him of money due his client, and to

ATTORNEY AT LAW (Continued).

promptly pay over the same upon the settlement of his fee, and in no case is he warranted in falsely stating that the money has not been received. (*In re Bar Association v. McClellan*, 630.)

4. **UNPROFESSIONAL CONDUCT—DISBARMENT.**—In this disbarment proceeding the conduct of the accused, although it amounted to a gross neglect to fulfill his obligation to his client, and constituted unprofessional conduct, was not such as to call for disbarment. (*Id.*)

ATTORNEY'S FEES. See Divorce, 6; Street Law, 11.

BANKRUPTCY.

DISCHARGE—JUDGMENT BARRED—MOTION TO QUASH EXECUTION—ABSENCE OF FRAUD.—On an appeal from an order denying a motion made by a defendant to quash an execution on a judgment on the ground that the judgment debtor had been released from the judgment by his discharge in bankruptcy, it is held that the judgment, which was entered by defendant's consent for money received by him from the plaintiff for a half interest in an inchoate land speculation which was never completed, was barred by the discharge, under subdivision 2 of section 17 of the Federal Bankruptcy Act, there being nothing disclosed by the complaint in the action from which the slightest inference could be drawn that the defendant obtained the money by false pretenses or representations, and there being no allegation therein of fraud or deceit practiced on the plaintiff by the defendant. (*Bowman v. Provident Realty Inv. Co.*, 115.)

BANKS AND BANKING.

1. **SIGNING OF BLANK NOTE—COMPLETION BY CASHIER—AGENCY.**—Where a depositor signs a blank promissory note and turns it over to the cashier of the bank with directions to fill it in and credit the proceeds to a given account upon receiving certain instructions, and such cashier thereafter, without having received the instructions, fills in the blanks in the note, he acts as the agent of such depositor and not of the bank. (*National Bk. of San Mateo v. Whitney*, 276.)
2. **LEGAL POSITION OF PARTIES.**—When such note was filled in by the cashier, the legal position of the parties was exactly the same as if the depositor himself, on the date the note was filled in, had taken or sent to the bank a completely filled and signed note. (*Id.*)
3. **ABSTRACTION OF FUNDS BY CASHIER—LOSS.**—If a depositor hands his promissory note to the cashier of the bank with instructions to charge the same to his personal account and credit the proceeds to the account of a given company, and such cashier charges

BANKS AND BANKING (Continued).

the note to the personal account of such depositor and abstracts the amount of the note from the bank's funds, the loss will fall on the bank. (Id.)

4. **DEPOSIT OF NOTE — DELIVERY — ACCEPTANCE.**— If a depositor manually delivers his note to a bank, there is no delivery within the meaning of the law until the bank, or someone acting for it, takes affirmative action, which may be a mere oral consent to advance the money represented by the note, the entry of the note in the books of the bank and the transfer of proper credit, or perhaps some other act; but, until the affirmative act is taken, there is no acceptance of delivery by the bank. (Id.)
5. **DISREGARD OF PRESCRIBED CONDITIONS — DELIVERY.**— If conditions prescribed by such depositor are fraudulently disregarded by the bank, or its agent, there is no delivery binding the maker, there being no meeting of minds. (Id.)
6. **ABSTRACTION OF FUNDS BY CASHIER — CAUSE OF PREJUDICE.**— Where the cashier placed the note in the bank's files and caused it to be charged to the account of the depositor and then abstracted the amount of the note from the bank's funds, the prejudice suffered by the bank was by reason of the theft by such cashier, and not by reason of the note. (Id.)
7. **CONSIDERATION FOR NOTE — PRESUMPTION — BENEFITS.**— The presumption of consideration because a note is written cannot overcome direct evidence that neither the depositor nor the company to whom he had directed that the proceeds be credited received any benefit from the transaction. (Id.)
8. **PRINCIPAL AND AGENT — MISAPPLICATION OF FUNDS — LIABILITY OF PRINCIPAL — EXCEPTION TO RULE.**— The rule that where one trusts another with commercial paper, either signed or unsigned, and the person trusted misapplies the funds received for such commercial paper, the loss falls on the trustor, because the wrongdoer is his agent, does not apply where such agent subsequently gets possession of the money of another principal. (Id.)
9. **ESTOPPEL — INNOCENT PARTIES — ACTS OF THIRD — LIABILITY.**— The rule that where one of two innocent parties must suffer by the acts of a third, the loss must fall upon the first negligent actor, can have no application where a depositor of a bank delivers to the cashier his promissory note, with instructions to charge the same to his account and credit the proceeds to a given company, and such cashier, after depositing the note in the bank's files, abstracts the amount of the note from the bank's funds. (Id.)

BILL OF EXCEPTIONS. See Disqualification of Judges.

BILL OF LADING. See Common Carriers, 1.

BONDS.

1. **APPEAL — CONSTRUCTION OF TERMS — DISCHARGE OF OBLIGATION.**—Where, on appeal from a judgment in favor of the plaintiff in an action to enforce a lien for labor performed and materials furnished in the construction of a yacht which had been purchased by the defendants, the bond is definitely conditioned to remain in force until the appeal shall be determined by the supreme court, and provides that "should the supreme court reverse said judgment . . . then in that event this obligation to be void," the obligation of the bond is fully discharged when the supreme court reverses the judgment. (*Jensen v. Allen*, 309.)
2. **IMPLIED AGREEMENT—BREACH.**—Where, as in this case, there is an agreement necessarily implied that if the bond is given, the possession of the boat shall remain with the defendants, the plaintiff, by thereafter taking possession of the boat under a writ of attachment, breaches the condition on his part to be performed and the obligation of the bond comes to an end. (*Id.*)
See Corporations, 10; Criminal Law, 6-10; Leases, 11, 13-15; Street Law, 9.

BROKERS.

1. **ACTION FOR SHARE OF COMMISSION ON SALE OF REAL ESTATE.**—In this action against defendant's intestate upon an alleged oral contract to assist defendant in locating land and to assist in selling the same, for a consideration of one-third of the commission received by defendant's intestate on the sale of the land, a nonsuit was properly granted, the evidence failing to prove that defendant's intestate received any commission on the sale as made. (*Pearson v. Wheeler*, 170.)
2. **COMMISSIONS ON SALE OF REAL ESTATE — PROCURING CAUSE — FINDING FOR DEFENDANT SUPPORTED BY EVIDENCE.**—In this action by a real estate broker for commissions on the sale of a ranch, the evidence supported a finding that the sale was not made through any effort of the plaintiff. (*Roth v. Thompson*, 208.)
3. **SALE BETWEEN PURCHASER AND VENDORS.**—The mere listing of the property by the brokers and sending purchasers letters describing it among other properties for sale, without calling particular attention to it, did not make the brokers the procuring cause of the sale where the purchasers had been trying to buy the property for a period of eleven years without arriving at an agreement, and finally bought it directly from the owners after the latter had reduced the price slightly. (*Id.*)
4. **RULE AS TO BROKER'S RIGHT TO COMMISSION.**—To entitle a broker to commission for the sale of real estate, which he has been given by the owner authority to sell, he must produce before the owner a pur-

BROKERS (Continued).

- chaser ready, willing, and able to purchase at the price and on the terms specifically expressed in the contract of employment. (Id.)
5. **CHANGE BY OWNER IN TERMS OF SALE.**—A change made by the owner in the terms of sale when consummating the sale cannot impair the right of the broker to his commission. (Id.)
 6. **BROKER AS PROCURING CAUSE.**—In order to recover commissions, the broker must be the "procuring" cause and not one in a chain of causes of the sale. (Id.)
 7. **NO EXCLUSIVE CONTRACT.**—Where a broker had written to the owner asking if his ranch was still for sale and if there had been any change in the price, and the owner replied, setting a price and mentioning the commission he was willing to pay, the owner still had the right to sell independently of the broker, since there was no exclusive right to sell and no time fixed within which the sale might be made. (Id.)
 8. **EVIDENCE—HEARSAY.**—In a broker's action for commission on sale of a ranch a statement by one of the owners that the broker had nothing to do with the sale was clearly hearsay and self-serving, and an objection to the testimony should have been sustained. (Id.)

See Vendor and Vendee, 2, 3, 7, 8.

BUILDING CONTRACTS.**ADDITIONAL WORK ORDERED BY ARCHITECT—LIABILITY OF OWNER.**

Where the contract to lay a concrete floor in the basement of a building binds the contractor to do the work under the architect's direction, the owner of the building is liable to such contractor for extra work performed in the laying of a floor of additional thickness than that called for by the contract which is ordered by the architect after his attention is called by the contractor to the condition found to exist in the basement after the water is pumped out. (Scribante v. Edwards, 561.)

See Mechanics' Liens, 22, 23.

CITIES. See Municipal Corporations.

COLLATERAL ATTACK. See Estates of Deceased Persons, 2.

COMMISSIONS. See Brokers, 1-7; Contracts, 23.

COMMON CARRIERS.

1. **BILLS OF LADING—LIMITATION OF LIABILITY—VALIDITY OF PROVISION.**—A provision in a bill of lading that "the amount of any loss or damage for which any carrier is liable shall

COMMON CARRIERS (Continued).

be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including freight charges, if prepaid) at the place and time of shipment under the bill of lading . . . whether or not such loss or damage occurs from negligence," is valid as to transactions involving interstate commerce. (*Crenshaw Bros. v. Southern Pac. Co.*, 603.)

2. **SEPARATE CHARGE FOR REFRIGERATION—EFFECT ON CONTRACT.**—Such covenant in a contract in connection with the shipment of fruit is not affected by the fact that there is a separate and distinct charge for refrigeration, although the loss may be from imperfect refrigeration, where such refrigeration is inseparably connected with the transportation of the fruit and is an essential part of the transaction. (*Id.*)
3. **LOSS—MEASURE OF DAMAGES.**—Under such form of contract the shipper can recover only his actual loss instead of his full compensatory damage. (*Id.*)

COMMUNITY PROPERTY.

PRESUMPTION—REBUTTAL EVIDENCE.—In this action to quiet title to certain real property claimed by one of the defendants to have been the community property of herself and plaintiff's predecessor, the presumption that the property was community in character, it having been acquired during coverture, was overcome by the positive testimony of plaintiff's predecessor that it was paid for out of money received for the sale of other land which he owned prior to his marriage to such defendant. (*Lisenbee v. Lisenbee*, 772.)

See Divorce, 11, 12, 34; Mortgages, 13.

CONDITIONS. See Deeds, 8, 12; Leases, 13.

CONSIDERATION. See Appeal, 37; Banks and Banking, 7; Contracts, 3, 40, 46; Deeds of Trust, 1; Leases, 15; Mortgages, 6, 7, 10; Sales, 2.

CONSTITUTIONAL LAW.

1. **SPECIAL LAWS—LEGISLATIVE POWER.**—The constitution does not deprive the legislature of the power to pass all special acts; but forbids special laws in all cases where a general law can be made applicable. (*Argyle Dredging Co. v. Chambers*, 332.)
2. **INALIENABLE RIGHTS OF INDIVIDUALS—EFFECT OF PROVISION.**—The phrasing of the inalienable rights of the individual in section 1, article I, of our state constitution effects in no degree an enlargement or abridgment of the civil immunities of the citizen, nor does

CONSTITUTIONAL LAW (Continued).

it operate to limit or increase the authority of the legislative department of the state government. (*Manford v. Singh*, 700.)

See Divorce, 33; Reclamation Districts, 2-4; Street Law, 11; Wage Law, 1.

CONTEMPT. See Supplementary Proceedings, 4.

CONTINUANCES.**TRIALS—ABSENT WITNESS—CONTINUANCE REFUSED—HARMLESS ERROR.**

Where the parties stipulated that the evidence of an absent witness might be introduced after all other available evidence had been introduced, the trial court did not commit reversible error in refusing to grant a continuance on account of the continued absence of such witness where his testimony could have had no greater force than to import a further conflict of evidence upon an immaterial matter. (*Patterson v. Almond City Land etc. Co.*, 285.)

See Criminal Law, 27.

CONTRACTS.

1. **VOID AGREEMENT—SALE OF GAS APPLIANCES—FURNISHING GAS—RESTRAINT OF TRADE—PUBLIC POLICY.**—A contract, under which a gas corporation, furnishing gas to a city and its inhabitants, agreed to install for a private consumer certain appliances and piping, in consideration of which the consumer agreed to purchase from the gas corporation all gas which he might use, and in case of his failure to do so, and the purchase by him of gas from any other company, to pay to the contracting company a fixed sum in settlement for the articles installed, was illegal and contrary to public policy, as it was not only in restraint of trade, but if upheld would tend to stifle competition and give the contracting gas company a monopoly of the business of furnishing a supply of gas in the city, and hence be detrimental to the public welfare. (*Coombs v. Burk*, 8.)
2. **SALE—CONDITIONAL SALE CONTRACT—TRANSFER BY VENDEE WITHOUT IMMEDIATE DELIVERY—VOID AS TO ATTACHING CREDITOR OF ORIGINAL VENDEE.**—Where the vendee in possession of personal property under a conditional contract of sale assigned the contract with the consent of the original vendor to a third person, who assumed the payments specified in the contract, and without ever having taken the property into his possession made the specified payments to the original vendor and received a bill of sale from the vendor, but made an arrangement with his assignor under which the latter retained possession of the property, the sale and purported transfer from the original vendee and the conditional contract to his assignee was as to an attaching creditor of the former to be deemed fraudulent.

CONTRACTS (Continued).

- lent and void under section 3440 of the Civil Code, and a bill of sale from such assignee was ineffectual as a transfer of the property. (*Abrahams v. Hammel*, 11.)
3. **SUBSEQUENT AGREEMENT BY GRANTOR TO CLEAR TITLE—CONSIDERATION—EXTINGUISHMENT OF EXISTING DIRECT LIABILITY.**—The liability of the covenantor for such breach is a sufficient consideration for a subsequent agreement on his part to clear the title to the property in question, and such subsequent agreement extinguishes the then existing direct liability. (*Woods v. Bennett*, 34.)
4. **BREACH OF SUBSEQUENT AGREEMENT—LIABILITY.**—On breach of such subsequent agreement by failure to perform it, the covenantor becomes immediately liable to the covenantee in the amount of the judgment as damages. (*Id.*)
5. **SALARY—ACTION FOR—COMMISSIONER AT EXPOSITION—DURATION OF EMPLOYMENT.**—In this action against a county to recover three months' salary, claimed as an employee of the county under the designation of commissioner for the county at the Panama-Pacific International Exposition of 1915, the evidence is held sufficient to support the finding that the plaintiff was employed for a definite period including the three months in question. (*Forrington v. County of San Luis Obispo*, 44.)
6. **VENDOR AND VENDEE—EXCHANGE OF RANCH AND PERSONAL PROPERTY—FRUIT TRAYS "NOW" SITUATED ON PROPERTY—CONSTRUCTION OF CONTRACT.**—A contract for an exchange of a ranch and "all the following described personal property now situate" thereon, describing, among other things, "all trays and boxes," included only fruit trays on the ranch at the date of the contract and did not include fruit trays which at the time of the contract were, and for a period of a year or more had been, in the possession of a third party on another ranch. (*White v. Greenwood*, 113.)
7. **CONTRACT UNAMBIGUOUS AND WITHOUT UNCERTAINTY—CONSTRUCTION—ASSUMPTION OF MORTGAGE.**—The contract being unambiguous and without uncertainty, the fact that in making the exchange the defendants assumed and agreed to pay as a part of the consideration on their part for the whole property an existing mortgage on the trays is unimportant as a means of interpretation. (*Id.*)
8. **CONTRACT IN WRITING—RULE OF INTERPRETATION—INTENTION.**—When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. (*Id.*)
9. **CONSTRUCTION OF ALTERNATIVE PROMISE—PRIMARY OBLIGATION TO PAY MONEY.**—Where a person agrees to repay to another, on or before a given date, a stated sum of money which has been previously advanced, or in lieu thereof to deliver to said person a given number of shares of the capital stock in a certain corpora-

CONTRACTS (Continued).

tion thereafter to be formed, the principal obligation is to pay such sum of money, subject to the proviso that said person might relieve himself from such payment by delivering the shares of stock on or before the given date, and upon his failure to pay the money or exercise his option to deliver the stock in lieu thereof, within the time limited, the other is entitled to maintain an action to recover the money. (*Rehnert v. Beam*, 264.)

10. **RESCISSION—RESTORATION OF CONSIDERATION.**—Deposit in a bank, by one party to an agreement of exchange who desires to rescind the contract on the ground of fraud, of a deed of reconveyance to the other party, and notification to such other party to call for it, constitutes a sufficient notice of rescission and offer to restore the consideration. (*Patterson v. Almond City Land etc. Co.*, 285.)
11. **ACTION ON CONTRACT—FINDING—EVIDENCE.**—In this action brought to recover a stated sum for water alleged to have been furnished to one of the defendants under a written contract, there was substantial evidence in support of the finding of the court that the plaintiff did not deliver the water in accordance with its contract. (*Sutter Butte C. Co. v. Richvale L. Co.*, 451.)
12. **VENDOR AND VENDEE—RESERVATION OF RIGHT OF WAY—CONSENT TO BY VENDEES—INTENT.**—Where an instrument executed and recorded by the owner of a tract of land purporting to reserve to "its assigns and successors" a right of way for canals and ditches necessary for irrigation is incorporated by reference in a subsequent agreement of sale covering a portion of the tract, and in such agreement the vendees recognize and consent to said "reservation," in an action by such vendees to recover compensation for land appropriated for such right of way, the court is not justified in resorting to technical refinement as to the meaning of "reservations" to defeat the manifest intent of the parties to exclude such right of way from the operation of the deed to be executed pursuant to such agreement of sale. (*Id.*)
13. **PURCHASE SUBJECT TO RESERVATIONS—ESTOPPEL.**—Where such vendees agree that their deed shall be subject to such a reservation of a right of way for canals and ditches, and, acting upon that agreement, a third person and the vendor enter into a contract under which such canals and ditches are made without any objection from said vendees, the latter will be estopped from claiming that said stipulation and reservation is void. (*Id.*)
14. **RESERVATIONS IN FAVOR OF STRANGER—EFFECT OF.**—An attempted reservation or exception in a conveyance in favor of a stranger, although not conferring title, may sometimes operate as an admission in his favor, or as an estoppel against the grantor. (*Id.*)
15. **LEASES—ORAL CONTRACT FOR—SPECIFIC PERFORMANCE.**—An oral contract between a landlord and tenant whereby the tenant agrees

CONTRACTS (Continued).

to execute a new lease to the entire premises when certain additions to be made by the landlord for the benefit of such tenant have progressed to a given stage is at no period of its existence specifically enforceable. (Johnson v. Wunner, 484.)

16. **FULL PERFORMANCE BY ONE PARTY—MUTUALITY—SPECIFIC PERFORMANCE—DIVISIBILITY OF COVENANTS.**—Neither party to an obligation can be compelled specifically to perform it unless the other party has performed, or is liable to specifically perform; and under this rule the contract cannot be divided into independent covenants. (Id.)
17. **LEASES—ACTION TO COMPEL SPECIFIC PERFORMANCE—DAMAGES FOR BREACH—PLEADING.**—In an action to compel specific performance of an oral contract to execute a lease, the court cannot allow damages for breach of the agreement where no issue of damages is tendered, the only allegation of damage in plaintiff's complaint being a mere conclusion of law "that unless said lease be executed plaintiff will suffer great and irreparable injury and loss." (Id.)
18. **SALES—PURCHASE OF CHATELS—SECURITY—DEFAULT—REMEDIES OF VENDOR.**—Where the purchaser of the furniture, furnishings, and leasehold interest in a certain lodging-house agrees to pay a part of the purchase price on a given date and to execute a chattel mortgage on the furniture for the balance, and as further security to execute a deed to certain real property to be deposited in escrow, and it is provided in the agreement that upon default of the purchaser to fulfill his obligations under the contract the deed is to be delivered to the vendor and the property forfeited as "liquidated damages," upon failure of the purchaser to make the payments as agreed, the vendor is not required to resort to an action for damages as her only means of obtaining satisfaction of the obligations assumed by the purchaser, but may pursue her remedy by an action for specific performance. (Kirch v. Wattell, 501.)
19. **ACTION FOR SPECIFIC PERFORMANCE—DECREE.**—In an action for specific performance of such a contract, after default by the purchaser, the court properly decreed that the deed be delivered to the vendor to be retained by her as security for the performance of the obligations of the purchaser. (Id.)
20. **LEASES—ORAL AGREEMENT FOR—POSSESSION OF PREMISES UNDER—BREACH—REMEDIES—MEASURE OF DAMAGES.**—Where a person enters into possession of premises in reliance upon an oral offer by the owner to lease the land to him for a term of years at a given rental, and continues in possession until the end of the first season, at which time the owner refuses to execute a written lease of the property, his remedy (if any exists) is not an action in *quantum meruit* for work done thereunder, since there was no contract under which he could have performed any work, but for a breach of the

CONTRACTS (Continued).

- oral promise made by the owner to make the lease, in which case the measure of damages, as provided by section 3300 of the Civil Code, is the amount which will compensate him for the detriment proximately caused by such breach, or which will be likely to result therefrom. (*Martinez v. Yancy*, 508.)
21. **SALES—OPTION TO CANCEL CONTRACT—EXERCISE WITHIN REASONABLE TIME.**—Where a contract for the purchase of grapes provides that if the tax on brandy used in fortifying wines shall be increased from a given sum per gallon, the purchaser might at its option terminate the contract by giving notice to that effect, and thereafter such tax is increased, the purchaser exercises its option to cancel the contract within a reasonable time where it gives the notice of cancellation two and one-half months before the commencement of the vintage season, or seven months after the occurrence of the event giving rise to the right of cancellation, where such delay is not for any unfair purpose and the growers have suffered no loss or prejudice because of such delay. (*Clovis Fruit Co. v. California W. Assn.*, 623.)
22. **WHEN TIME MATERIAL—OBJECT OF LAW.**—Time is material in such cases so far only as, when associated with other circumstances, it may produce injury or unjust consequences. (*Id.*)
23. **ACTION FOR MONEYS DUE—FINDINGS—EVIDENCE.**—In this action to recover commissions alleged to be due plaintiff in connection with the sale of stock of a certain corporation, also to recover a further sum claimed to be due plaintiff in connection with certain collections alleged to have been made, the findings of the trial court in favor of the defendants were supported by the testimony of the defendants. (*Adams v. Pletsch*, 641.)
24. **CONTRADICTORY EVIDENCE—PROVINCE OF TRIAL COURT.**—Where the testimony of the two defendants was contradictory, it was for the trial court to weigh and reconcile such inconsistencies by accepting, in whole or in part, the testimony of either defendant. (*Id.*)
25. **FRAUD—PLEADING—EVIDENCE.**—Where a party is induced through fraud to enter into an agreement waiving his claim and right to money which might in a certain contingency become due to him, in an action to recover such money after the happening of the contingency, evidence of the facts constituting the fraud is admissible only if such facts are pleaded. (*Id.*)
26. **DUTY OF VENDEE TO INVESTIGATE STATEMENTS OF VENDOR.**—One party to a contract is under no obligation to investigate and verify the statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. (*Shermaster v. California Bldg. etc. Co.*, 661.)

CONTRACTS (Continued).

27. **ACT TO RESCIND CONTRACT—COMPUTATION OF AMOUNT OF JUDGMENT.**—In an action for the rescission of a contract for the sale of real property, a judgment for the plaintiff computed by adding the amount paid by the plaintiff on account of the purchase of the lots, plus interest, with a sum added for the "value of improvements placed on the land and premises, exclusive of any sum due defendant from plaintiff for use and occupation of said land and premises since said contract of sale was entered into," is correct. (Id.)
28. **COST OF IMPROVEMENTS—EVIDENCE OF VALUE.**—In such an action, testimony as to the cost of the improvements placed on the land and premises is some evidence of value. (Id.)
29. **OFFER TO RESCIND—SUFFICIENCY OF.**—A written offer to rescind, accompanied by tender of a quitclaim deed to the premises upon given terms, is sufficient. The fact that the vendee demands more from the vendor than he is entitled to recover, in the absence of a specific objection made to the tender, does not invalidate such offer. (Id.)
30. **CONTINUANCE IN POSSESSION—WAIVER OF RIGHT TO RESCIND.**—The right to rescind a contract for the sale of real property on the ground of fraudulent representations is not waived by remaining on the property after offer of rescission, where such occupancy is continued for the purpose of protecting the property for all parties to the litigation and the vendor is not injured thereby. (Id.)
31. **SALE OF TRUCK—FAILURE OF SELLERS TO PERFORM—RESCISSON BY CONSENT.**—Where the sellers, without performance of their promise to furnish the buyer with a truck of a given capacity, in the absence of which no duty is imposed upon the buyer to pay the note given as payment, demand the return of the truck and the buyer complies therewith, a rescission by consent is implied from such acts. (Hogan v. Anthony, 679.)
32. **RESCISSON BY BUYER—COMPLIANCE WITH CODE.**—The refusal of the buyer to pay the note given in payment of the truck on account of the fraud of the sellers, and the returning of the truck upon the discovery of the fraud, is all that he is required to do by section 1691 of the Civil Code to accomplish a rescission. (Id.)
33. **CONDITIONAL SALE—LEASE—TRUE CHARACTER OF AGREEMENT—FORM IMMATERIAL.**—While the law applicable is the same whether the agreement between the sellers and the buyer of a truck constitutes a conditional sale or a lease thereof, the sellers cannot, by designating the contract a lease, take from it its true character as a contract for the conditional sale of the truck where the parties clearly contemplate a sale by the one and a purchase by the other. (Id.)

CONTRACTS (Continued).

34. **SALE OF WHEAT "F. O. B."**—**ACTION FOR BREACH**—**PLACE OF DELIVERY**—**EVIDENCE**—**USAGES AND CUSTOM.**—In an action for damages for breach of contract to deliver a cargo of wheat to plaintiffs "f. o. b." a designated steamer at a given port, evidence of the nature of the transaction, and the usages and custom of the trade in such matters, is admissible for the purpose of determining the place of delivery of the wheat contemplated by the parties under the "f. o. b." clause. (*Meyer v. Sullivan*, 723.)
35. **INTERPRETATION OF TERM**—**PROVINCE OF TRIAL COURT.**—In such action, it is the province of the trial court to apply the knowledge gained from the testimony of the witnesses as to the usages and custom of the trade in such matters to the surrounding circumstances in which the parties were placed, and to find and determine what "f. o. b." the designated steamer implied. (*Id.*)
36. **MEANING OF TERM "F. O. B."**—The general rule seems to be that if the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery; but the effect of "f. o. b." depends on the connection in which it is used, and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery. (*Id.*)
37. **PROVISION FOR BENEFIT OF BUYERS**—**WAIVER.**—A provision in a contract obligating the sellers to transfer the goods agreed to be sold from the dock to the deck of the vessel is in the nature of a covenant for the benefit of the buyers which they can waive. (*Id.*)
38. **EFFECT OF WAR CONDITIONS**—**PERFORMANCE NOT EXCUSED.**—The fact that the war conditions rendered the contemplated means of performance unavailable did not excuse the sellers from the performance of their contracts where the buyers were ready, willing, and able to perform their part of the contract. (*Id.*)
39. **BREACH—MEASURE OF DAMAGES.**—In an action for damages for breach of contract to deliver a cargo of wheat, in arriving at the amount of damages suffered by the plaintiffs, it is proper for the court to take into consideration the difference between the contract price agreed to be paid for the wheat by plaintiffs, and the market price, which may be taken as the value, at the agreed time and place of delivery. (*Id.*)
40. **PURCHASE OF NOTE—INDEMNITY AGAINST LOSS—CONSIDERATION—FINDINGS.**—In an action upon an agreement made subsequent to the sale of a promissory note and its security whereby the defendant agreed to protect plaintiff against loss or damage arising from the sale thereof by defendant himself, it is not necessary to decide whether the contract sued upon is a contract of guaranty and supported by a sufficient consideration where it is found that the contract was supported by a sufficient consideration. (*Adler v. Sawyer*, 778.)

CONTRACTS (Continued).

41. INDEMNITY AGAINST LOSS ON PURCHASE OF NOTE—STATUTE OF LIMITATIONS.—An agreement made subsequent to the sale of a promissory note and its security to protect the purchaser against any and all possible loss or damage that he might sustain by not being able to in any manner realize the full benefits of the note and security or to recover the full amount of said note is a contract of indemnity, rather than a contract of guaranty, and a right of action thereon does not accrue against the indemnitor until the person suffers the loss against which the contract protects him. (Id.)
42. ORAL AGREEMENT TO MAKE GIFT OF LAND—SPECIFIC PERFORMANCE. An oral contract to make a gift of land, followed by possession on the part of the donee and the making of valuable improvements thereon in reliance upon such agreement, is sufficient to justify a decree of specific performance on the part of the donor, or the party standing in his place with notice of the rights of the donee, where the property covered by the contract is fully identified. (Peixouto v. Peixouto, 782.)
43. FULL PERFORMANCE BY VENDEE—RUNNING OF STATUTE OF LIMITATIONS.—When there exists a contract to convey land and the vendee has fully performed and nothing remains to be done on his part, the vendor and those who take the land with knowledge of the vendee's rights then hold the bare legal title in trust for the benefit of the vendee; and while the *cestui que trust* is in possession, the statute of limitations will not run against him. (Id.)
44. REPUDIATION OF TRUST—RUNNING OF STATUTE OF LIMITATIONS.—In such a case, if the trustee wishes to start in operation the statute of limitations, he must in some way repudiate the agreement and *must take possession*, either in person or by agent, in order to break the relation his vendee sustained to him under the agreement before the statute will commence to run. Mere notice that the agreement is terminated and that the vendor desires possession is not sufficient. (Id.)
45. ENFORCEMENT OF CONVEYANCE BY CESTUI QUE TRUST.—In such a case, the *cestui que trust*, having the equitable title, is entitled to enforce a conveyance of the naked legal title as an incident to such equitable ownership. As long as the equitable title exists, it must exist with all its incidents. (Id.)
46. ACTION TO COMPEL SPECIFIC PERFORMANCE—CONSIDERATION—PLEADING.—In an action in equity to compel the specific performance of an oral agreement to make a gift of land, it is not necessary that the plaintiff allege in express language that the defendant received a valuable consideration, but only that he set out the facts and the value of the lands and that it affirmatively appear therefrom that the consideration was adequate. (Id.)

CONTRACTS (Continued).

47. **ORAL AGREEMENT TO MAKE GIFT—STATUTE OF FRAUDS.**—Such a contract to make a gift of land need not be in writing where it has been partly performed and valuable improvements have been made upon the property. (Id.)

See Appeal, 37; Common Carriers, 1-3; Mechanics' Liens, 7, 15-17; Sales, 2-5; Vendor and Vendee, 1, 5, 6.

CONVERSION. See Pleading, 8.

CORPORATIONS.

1. **COMPENSATION OF CORPORATION MANAGER—FIXING BY DIRECTORS—VALIDITY OF—QUALIFICATION OF DIRECTOR.**—In the absence of any showing of fraud, the action of the board of directors of a corporation in fixing the sum to which its manager is entitled and in directing the issuance of the corporation note therefor which is subsequently paid, is not void by reason of the fact that such action is taken at a meeting attended by a bare majority of the board, one of whose members making up such majority is the wife of said manager. (*Cuneo v. Giannini*, 348.)
2. **FORFEITURE OF CHARTER—TITLE TO PROPERTY—RIGHTS AND DUTIES OF DIRECTORS AS TRUSTEES.**—Under the amendment of 1907 to the act of 1905 (Stats. 1907, p. 746, sec. 10a), when a corporation forfeits its charter for nonpayment of the State License Act, the title to its property vests in those who are its stockholders at the time of its demise, the directors then in office becoming the trustees for the corporation and the stockholders to settle the affairs of the corporation, and as such they have possession of its property, with full power to deal with and dispose of the property as is necessary to settle the affairs of the corporation. (*Crystal Pier Co. v. Schneider*, 379.)
3. **DIRECTORS DONEES OF POWER IN TRUST—POWERS.**—The directors in office at the time of the forfeiture of the charter of a corporation in becoming trustees for the corporation and the stockholders become donees of a power in trust—the legal title being vested not in them, but in third persons—and as such, in the absence of fraud, collusion, or abuse of discretion, they may execute the power without the interposition of any court. (Id.)
4. **POWER OF SALE IMPLIED.**—Since the "affairs" of a defunct corporation can seldom be settled without a sale or other disposition of at least some of the corporate assets, a power of sale necessarily is implied in the legislative grant of the power "to settle the affairs of the corporation." (Id.)
5. **POWER TO SELL LEASE—UNPAID RENTS—RIGHT OF PURCHASER.**—The trustees of a defunct corporation, in the settlement of its affairs, have the power to sell a lease to property of which the corporation

CORPORATIONS (Continued).

- had been the owner and to transfer the right to all moneys unpaid thereon, thereby vesting in the purchaser the right to sue for the recovery of all rents due and unpaid. (Id.)
6. **POWERS OF CORPORATION—ULTRA VIRES ACTS—NOTICE.**—Where an act is within the corporate powers for some purposes or under some conditions, the rights of parties who have dealt with the corporation under the express or implied representation that it is acting with such powers in the making of a particular contract, are entitled to favorable consideration; and in such a case the defense of *ultra vires* is not available unless it is shown that the party dealing with the corporation had notice of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying performance. (James Eva Estate v. Oakland B. & M. Co., 515.)
7. **LIABILITY TO THIRD PARTIES—DEFENSE—DIRECT ATTACK.**—The attempt of a corporation to use the defense of *ultra vires* as a means of escaping its liability to third parties is regarded with much less favor than when a direct attack upon such corporate act is made by a stockholder or by the state. (Id.)
8. **BURDEN OF PROOF.**—Where the corporate act is within the powers of the corporation for some purposes and is claimed to be without its powers under given circumstances, the burden of proving the latter state of affairs rests upon the corporation denying its liability. (Id.)
9. **POWER TO EXTEND FINANCIAL AID.**—A corporation organized for the purpose of operating and maintaining the general business of brewing and malting may, in furtherance of its own interests, extend financial aid to its customers. (Id.)
10. **GENERAL POWER—WANT OF BENEFIT—BURDEN OF PROOF.**—Where it is within the general powers of a corporation to execute a guaranty bond under some circumstances, but such act is *ultra vires* if such corporation receives no direct benefit therefrom, in an action to recover upon such bond, the burden is on the corporation of proving that it received no such benefit. (Id.)
11. **LIABILITY OF STOCKHOLDER FOR TORT OF CORPORATION—SURVIVAL OF RIGHT OF ACTION.**—A cause of action exists against the stockholder of a corporation upon a corporate liability arising out of a tort, and such cause of action survives the death of the stockholder. (Damiano v. Bunting, 566.)
12. **STATUTE OF LIMITATIONS—DEATH OF STOCKHOLDER.**—An action against a stockholder, or his personal representative, upon a corporate liability arising out of a tort must be brought within the three-year limitation prescribed by section 359 of the Code of Civil Procedure. Where the stockholder dies within such three-year period, the time within which such action might be brought is not,

CORPORATIONS (Continued).

by reason of the provisions of section 353 of the Code of Civil Procedure, extended to within one year after the issuing of letters testamentary or of administration. (Id.)

13. **JUDGMENT AGAINST CORPORATION—WHEN TIME BEGINS TO RUN.** The time within which such action based on the stockholder's liability might be brought dates from the time of the plaintiff's injuries and not from the time he recovers judgment against the corporation for such injuries. (Id.)

14. **FORFEITURE OF CHARTER—NONPAYMENT OF FRANCHISE TAX—EVIDENCE.**—Forfeiture of the charter of a corporation in a given year by reason of failure to pay its franchise tax cannot be proved by testimony of a deputy of the Secretary of State that he made due search of the records in the office of the Secretary of State for the purpose, and found that no tax had been paid by the corporation for that year. (*Conlin v. Southern Pacific R. R. Co.*, 733.)

15. **IRRELEVANT EVIDENCE—REFUSAL OF—INSTRUCTION.**—Where the evidence as to the forfeiture of the charter of a corporation is irrelevant to any issue of the case, it is not error to refuse to instruct the jury on the question of such forfeiture. (Id.)

See Agency, 2; Leases, 10; Pleading, 8a, 10.

COSTS. See Divorce, 2.

COURTS.

TRANSFER AND ASSIGNMENT OF CASES.—The judges of the superior court in a particular county, for the more convenient dispatch of business or for any reason they may deem necessary, may assign or transfer cases for trial to any one or more of the several departments of such court. Notice of such transfer is not required by the statute. (*Ransome-Crummey Co. v. Wood*, 355.)

COVENANTS. See Deeds, 1; Eminent Domain, 1.

CRIMINAL LAW.

1. **MURDER IN SECOND DEGREE—CRIMINAL ABORTION—CORPUS DELICTI—EVIDENCE SUFFICIENT.**—In this prosecution for murder alleged to have been committed by the defendant in the performance of an abortion, and in which the defendant was convicted of the crime of murder in the second degree, the evidence is examined and found abundantly sufficient to establish that the death of the young woman in question was due to an operation performed upon her, which was criminal in character as not necessary to preserve her life. (*People v. Card*, 22.)

CRIMINAL LAW (Continued).

2. **VERDICT OF GUILTY SUSTAINED BY EVIDENCE.**—The evidence was also sufficient to sustain the verdict of the jury holding the defendant responsible for the decedent's death by means of a criminal abortion. (Id.)
3. **ACCOMPLICE—TESTIMONY CORROBORATED.**—The testimony of a companion of the deceased, who the court instructed the jury was an accomplice, is also examined in such case and found to be sufficiently corroborated as to all its essential parts. (Id.)
4. **UNPREJUDICIAL INSTRUCTION THAT ONE WAS AN ACCOMPLICE IN FACT.**—Error cannot be predicated by the defendant on the action of the court in instructing the jury that a witness, a companion of the deceased, was, as matter of fact, an accomplice, where, throughout the trial, defendant had taken the position that such person was an accomplice whose testimony required corroboration. (Id.)
5. **EVIDENCE—STRIKING OUT ANSWER NOT RESPONSIVE.**—An answer by a physician who had treated the deceased some weeks previous to her death, which answer, not responsive to the question asked her, stated that she had herself admitted a previous attempt to bring about an abortion, was properly stricken out. (Id.)
6. **BAIL BOND—ACTION TO REFORM AND ENFORCE—PLEADING—INSUFFICIENT OBLIGATION.**—Sureties on a bail bond must bind themselves that they will do certain things or upon default that they will pay the state a specified sum; it is insufficient where they agree that their principals will pay. (County of Merced v. Shaffer, 163.)
7. **JOINT BOND—EXCESSIVE PENALTY.**—Where an order of court provided that two defendants in a criminal case be admitted to bail in the sum of five hundred dollars each, a bond purporting to be given on behalf of both defendants and providing that if the conditions are not performed the obligors will pay the people of the state the sum of one thousand dollars is insufficient, as it requires payment of one thousand dollars if either or both defendants fail to appear, whereas the order required a penalty of only five hundred dollars for each. (Id.)
8. **STATUTORY BOND—COMMON-LAW OBLIGATION.**—A bond in a criminal proceeding is purely statutory; if it fails to conform to the statute and order of the court, it is not good as a common-law obligation. (Id.)
9. **WHEN BOND VOID.**—A bail bond in excess of the order of the court is absolutely void. (Id.)
10. **REFORMING VOID BOND.**—A bail bond void upon its face cannot be reformed, and the court below properly sustained a demurrer to the complaint. (Id.)
11. **CONFLICT OF EVIDENCE—REVIEW.**—In this prosecution for a violation of section 288 of the Penal Code, the defendant having denied

CRIMINAL LAW (Continued).

the commission of the act as testified to by the prosecuting witness, whose testimony was corroborated by her mother, and two other witnesses, it was for the jury to pass upon the conflict of testimony, and it having done so, the appellate court may not review the evidence in this regard. (*People v. Bernal*, 358.)

12. **INSTRUCTION—CREDIBILITY OF WITNESS—WEIGHT OF TESTIMONY.**—In such prosecution, the court properly instructed the jury that, "In determining as to the credit you will give a witness and the weight and value you will attach to a witness' testimony, you should take into consideration the conduct and appearance and manner of the witness while on the stand; the interest of the witness, if any, in the result of the trial; the motives which actuate the witness in testifying, or in giving contradictory or false testimony, the witness' relation or feeling toward the defendant and the probability or improbability of the witness' statement being true when considered with reference to all other evidence, facts, and circumstances proved in the case." (*Id.*)
13. **TESTIMONY OF DEFENDANT.**—In such prosecution, it was not error to instruct the jury that, "The defendant in this case has offered himself as a witness in his own behalf, and you are to judge his evidence by the same rules that you would that of any other witness. You have no right to disregard his testimony merely upon the ground that he is the defendant and stands charged with this crime; but you should fairly and impartially judge his testimony together with all other evidence in the case." (*Id.*)
14. **INTEREST OF WITNESS.**—No error was committed by the court in instructing the jury that, "In judging the credibility of a witness, whether such witness be the defendant, the prosecutor, or any other witness produced on either side, you may consider the interest and relation of such witness in and to the case. (*Id.*)
15. **ABSENCE OF MOTIVE—INTENT.**—The giving of an instruction to the effect that if the evidence in the case failed to show a motive on the part of the defendant for committing the crime charged in the information, that that was a circumstance which the jury must consider in connection with all the other evidence in arriving at its verdict, and that the absence of motive on the part of the defendant was a strong factor in favor of his innocence, followed by an instruction giving the definition of "intent" as laid down in section 21 of the Penal Code, was not error because of the use of the word "motive." (*Id.*)
16. **CONCERN OF JURY AS TO FINAL JUDGMENT—ARGUMENTATIVE INSTRUCTION.**—An instruction prefaced with the words "in view of the arguments in this case" and in which the court proceeded to tell the jury, in substance, that it was not concerned with what might be the final judgment, or sentence, of the court in the event they should

CRIMINAL LAW (Continued).

find the defendant guilty, and that the jury must put out of consideration entirely what the court might or might not do in the case, was not argumentative. (Id.)

17. REQUESTED INSTRUCTIONS — REPETITION.—The court properly declined to give the jury certain instructions proposed by the defendant which were only repetition of other instructions given. (Id.)
18. MISCONDUCT—WAIVER OF OBJECTION.—Where no assignment of misconduct, or request for an admonition to the jury to disregard objectionable remarks, is made at the time of the trial, the objection will, on appeal, be deemed to have been waived. (Id.)
19. LIMITATION OF ARGUMENT—DISCRETION.—Under the circumstances in this case, the action of the trial court in limiting the argument of the defendant's counsel to the jury was no abuse of discretion. (People v. Prewett, 416.)
20. INSTRUCTIONS—PENALTIES—ERROR.—In a prosecution for murder, the giving of instructions relating to punishment for murder in the first degree, for murder in the second degree, and for manslaughter, also relating to indeterminate sentences, although not to be commended, does not constitute prejudicial error where the jury is further instructed that the penalty which may be attached to the commission of the crime must not influence them in determining the question of the innocence or guilt of the accused. (Id.)
21. APPEAL—ERROR CURED—PRESUMPTION.—In such case, the last instruction would, if followed by the jury, have the effect of effacing whatever prejudice the defendant might have suffered from the giving of the instructions in relation to penalties; and in the absence of any indication to the contrary, the appellate court will assume that the jury did in fact obey such last instruction in its deliberations and in the rendition of its verdict. (Id.)
22. ASSAULT WITH INTENT TO COMMIT RAPE—DEFECTIVE INFORMATION —INSUFFICIENT GROUND FOR REVERSAL.—In view of the mandatory direction of section 4½ of article VI of the state constitution, the omission to allege in an information charging assault with intent to commit rape that the victim of the assault was not the wife of defendant is not a sufficient defect to warrant a reversal of the judgment, where the record shows that the woman was not in fact the wife of the defendant and that the trial proceeded as if the allegation were there, and fails to show that a miscarriage of justice resulted. (People v. Bonfanti, 614.)
23. EXAMINATION OF JURORS—BIAS OR PREJUDICE.—Where counsel for defendant in a criminal prosecution, by means of certain questions asked prospective jurors on their *voir dire*, desires to show

CRIMINAL LAW (Continued).

- bias or prejudice, he should state his reason for asking the questions. (*The People v. Hinshaw*, 672.)
24. **FORGERY—SIMILAR OFFENSES—EVIDENCE OF.**—In a prosecution for forgery, evidence of other similar offenses is admissible for the purpose of showing guilty intent and of rebutting the theory of accident or good faith. (*Id.*)
25. **CONFESSIONS—ORDER OF PROOF.**—In a prosecution for forgery, it is immaterial that the confession of the defendant is admitted in evidence prior to the introduction of any other evidence of the commission of the crime. The order of proof is a matter within the discretion of the trial court. (*Id.*)
26. **EXTRAJUDICIAL CONFESSIONS—ADMISSIBILITY.**—In such prosecution, extrajudicial confessions of the defendant alone are not sufficient evidence of the forgeries to render them admissible in evidence. (*Id.*)
27. **ABSENCE OF WITNESSES—REFUSAL OF CONTINUANCE—WHEN NOT ERROR.**—In a criminal prosecution, the trial court does not commit error in refusing to continue the trial of the case on account of the absence of a witness for the defendant, where the application is made after considerable progress has been made in the hearing of the cause and no reason is shown why it was not made when the case was called for trial, as the statute requires, and the testimony of the witness, if produced, would be simply cumulative. (*Id.*)
28. **BURGLARY—VERDICT—EVIDENCE.**—In this prosecution for burglary, the evidence, while largely circumstantial, was sufficient to support the verdict. (*The People v. Schiaffino*, 675.)
29. **APPEAL—FAILURE TO APPEAR—EXAMINATION OF RECORD.**—Where on appeal in a criminal case no brief is filed on behalf of the appellant and no appearance is made by or for him when the cause is, in its regular order, called for hearing and argument, and the case is submitted upon the record, it is not necessary that the reviewing court should enter into a minute examination of the facts. A general, or cursory, examination of the record is all that is required. (*People v. Medaini*, 676.)

DAMAGES.

1. **EMINENT DOMAIN—VALUE OF LAND—TIME—INSTRUCTION.**—In this action to recover the value of certain land appropriated by the defendant for railroad purposes, the court properly instructed the jury that in considering the value of the land and fixing the amount of compensation which the plaintiff was entitled to recover, such value was to be determined as of the time of the taking of the property by the defendant. (*Conlin v. Southern Pacific R. R. Co.*, 743.)

DAMAGES (Continued).

- 2. **COMPENSATION—MARKET VALUE.**—In such a case, the just compensation to which the plaintiff is entitled is the fair and reasonable market value of the land at the time of the taking, to wit, the highest price in terms of money which the land would bring, if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted, and for which it was capable of being used. (Id.)

See Common Carriers, 3; Contracts, 4, 17, 20, 39; Deeds, 1, 2; Landlord and Tenant, 4-6; Negligence, 19, 22, 27, 28.

DEBTOR AND CREDITOR. See Contracts, 2.

DEDICATION. See Streets, 1.

DEEDS.

1. **COVENANT AGAINST ENCUMBRANCES—BREACH—LIABILITY OF GRANTOR.**—The existence of a judgment lien is a breach of a covenant in a deed of conveyance that the land is free and clear of encumbrances, but as the covenant is one of indemnity, the grantor is liable in nominal damages only, where the grantee has suffered no actual injury from the encumbrance. (*Woods v. Bennett*, 34.)
2. **COVENANTOR'S CONTINGENT LIABILITY.**—The covenantor is also under a contingent liability to pay the full amount of the judgment upon its satisfaction by the grantee by payment. (Id.)
3. **DELIVERY—RECORDING—CHANGE OF POSSESSION—PASSING OF TITLE.** As between the grantor and the grantee, neither the recording of the deed nor the delivery thereof accompanied by a change of possession is essential to a valid conveyance. (*Knox v. Kearney*, 290.)
4. **ACCEPTANCE IMPLIED.**—Where a deed is delivered to the grantee in person, an acceptance will be implied, in the absence of evidence to the contrary. (Id.)
5. **LEGAL AND EQUITABLE INTERESTS—OPERATIVE WORDS.**—Where a grantor conveys certain lands, reserving and excepting the subterranean oils and minerals and the right to enter upon the lands to dig, bore, or mine for the same, and takes a mortgage on the lands conveyed to secure the payment of a certain promissory note, the operative words "remise, release and forever quitclaim all my right, title and interest, both in law and equity," are the most apt which he can select to thereafter convey to his grantees both his equitable interest under the mortgage and his legal interest in the minerals and mining rights. (*McFarland v. Walker*, 508.)

DEEDS (Continued).

6. **GRANT—WHAT WORD INCLUDES.**—The word “grant” includes all sorts of conveyances, including quitclaim deeds. (Id.)
7. **CASE AT BAR—CONSTRUCTION OF INSTRUMENT.**—In this action to quiet title to certain minerals and mining rights, the operative words “remise, release and forever quitclaim all my right, title and interest, both in law and equity,” used by plaintiff’s testator, under the surrounding circumstances on making the instrument in question, were given their full significance and not construed merely as a release of mortgage, notwithstanding such instrument began with the recital “Whereas the said [grantees] are desirous of having their said tract of land relieved from the operation of said mortgage.” (Id.)
8. **RAILROAD RIGHT OF WAY—DURATION OF ESTATE—CONSTRUCTION OF CONVEYANCE.**—A deed to a railroad corporation which recites that for and in consideration of encouraging and promoting the construction of a railroad, and for other considerations, the grantor conveys the land described in such deed to the railroad company and its successors during “the legal existence of said company,” upon certain specified conditions, and which deed provides that, upon the breach by the said railroad company, or its successors, “of any of the aforesaid conditions, this grant shall become void, and the estate conveyed hereby . . . shall cease and determine, and the said lands shall absolutely revert to the said party of the first part [the grantor], his said heirs and assigns, in fee simple, . . . and shall in like manner, at the expiration of the legal existence of said company, revert to said party of the first part, his heirs and assigns, anything hereinbefore contained, to the contrary, notwithstanding” shows an intention to limit the duration of the grant to the period of the legal existence of the company, and not an intention to irrevocably dedicate the land to railroad use upon a condition subsequent. (Conlin v. Southern Pacific R. E. Co., 733.)
9. **CONVEYANCE OF REVERSIONARY INTEREST—CONSTRUCTION OF DEED.** A deed, made by the successor in estate of the grantor, conveying a large tract of land within which such right of way was included, conveys to the grantee the reversionary interest of the grantor therein, notwithstanding such right of way is reserved and excepted in the granting clause, where such clause is immediately followed by an explanatory provision showing an intent and purpose on the part of the grantor to convey such right of way to the grantee. (Id.)
10. **EMINENT DOMAIN—TAKING OF PROPERTY—RIGHTS OF OWNER AND SUBSEQUENT GRANTEEES—EFFECT ON CONTRACT OF RAILROAD COMPANY.**—While it is true that where land has been taken for public use without compensation being first made, and its continued possession is necessary to such use, the owner cannot recover posses-

DEEDS (Continued).

sion of the land itself, but can only compel payment for the same, and that the right to compensation accrues at the time of the taking, and while it is also true that this right to compensation is a personal one which does not run with the land, nor pass by conveyance thereof after the right accrues, these doctrines in no way affect or abridge the right of the railroad corporation to enter into a binding obligation or contract with reference to land taken by them for rights of way, and such agreements when made stand on the same footing as any other contract for the conveyance of land. (Id.)

11. **PRIVATE CONTRACTS OF RAILROADS—PUBLIC POLICY.**—In such cases public policy does not enter into the question, nor is it at all concerned with the private contracts of railroads unless they interfere with the public welfare. (Id.)
12. **ACCEPTANCE OF CONDITIONAL CONVEYANCE—EXPIRATION OF TERM—RIGHTS OF PARTIES.**—A railroad may accept a conveyance of land upon any condition that may lawfully be annexed to an ordinary grant; and such a contract may create an estate less than a fee in land taken for a right of way. If at the expiration of the estate granted the land is necessary for the railroad for railroad purposes, and the corporation or its successor elects to continue its use for a right of way, it can do so by compensating the reversioner; otherwise, it must abandon such portion of the right of way and surrender possession to the owner of the estate in reversion. (Id.)
13. **PRESUMPTION OF DELIVERY.**—Where a deed is read in evidence without objection, it carries with it the presumption of delivery at its date. (*Lisenbee v. Lisenbee*, 772.)

See Adverse Possession, 1; Easements, 18; Municipal Corporations, 5, 6.

DEEDS OF TRUST.

1. **SALE—PURCHASE BY CREDITOR—PAYMENT.**—Where property is sold for the purpose of satisfying the indebtedness secured by it, and the property is struck off and sold to the owner and holder of said indebtedness for the amount of the debt, it is not necessary that the property should be actually paid for in gold coin. The consideration for the property is the satisfaction of the indebtedness. (*Davies v. Ramsdell*, 424.)
2. **VOID SALE—SECOND SALE—AUTHORITY—ESTOPPEL.**—Where in an action in ejectment it was stipulated that the deed under which plaintiff claimed title, which was executed by the trustee following a sale under a deed of trust, was a nullity, and thereupon judgment was entered accordingly, and thereafter the property was again sold to such plaintiff and a second deed issued to

DEEDS OF TRUST (Continued).

her, the trustor will be estopped from asserting in a suit to quiet title following such second sale that the trustee had no power to make such second sale. (Id.)

DELIVERY. See Banks and Banking, 5; Deeds, 13.

DEMAND. See Street Law, 2.

DEPOSIT. See Landlord and Tenant, 8, 10.

DESCRIPTION. See Street Law, 5.

DISCLAIMER. See Quieting Title, 1.

DISCRETION. See Appeal, 9; Criminal Law, 19; Negligence, 13; Pleading, 11; Receivers, 1.

DISMISSAL. See Appeal, 19, 25, 26; Judgments, 9; Summons, 1.

DISQUALIFICATION OF JUDGES.

VOLUNTARY WITHDRAWAL FROM TRIAL OF CASE—QUALIFICATION TO MAKE SUBSEQUENT ORDER THEREIN.—Where the judge of the county, although there is no showing of actual disqualification made, voluntarily retires from the trial of a case because of an intimation that he was *persona non grata* to plaintiff, he is not thereafter disqualified from making an order extending the time of defendant within which to prepare and serve its proposed bill of exceptions. (Conlin v. Southern Pacific R. R. Co., 733.)

DIVORCE.

1. **ALIMONY PENDENTE LITE AND SUIT MONEY—ORDER WITHOUT NOTICE—JURISDICTION.**—In an action for divorce, where the court has acquired jurisdiction of the person of the husband, it has the power to order, *ex parte*, without any previous notice, the payment to the wife of any reasonable sum for alimony and suit money. (Reed v. Reed, 102.)
2. **AMOUNT ALLOWABLE AS SUIT MONEY—DISCRETION OF TRIAL COURT.** Discretion is vested in the trial court as to the amount to be allowed the wife as suit money to enable her to prosecute or defend an action for divorce, and only a plain case of abuse of discretion is subject to correction by an appellate court. (Id.)
3. **ORDER ALLOWING SUIT MONEY—APPEAL UNDER ALTERNATIVE METHOD—AMOUNT CLAIMED TO BE UNNECESSARY OR EXCESSIVE—APPELLANT'S BRIEF INSUFFICIENT.**—On appeal from an order allowing a wife alimony and suit money in an action for divorce, where the appeal is taken under the alternative method and the record is brought up on a typewritten transcript and the appellant con-

DIVORCE (Continued).

tends that the amount allowed was unnecessary or excessive, it is incumbent upon the appellant to print in his brief so much of the evidence as will enable the appellate court to say that there was no necessity for any sum whatever or that the sum allowed was so excessive as to amount to an abuse of discretion. (Id.)

4. **ALLOWANCE FROM TIME OF COMMENCEMENT OF ACTION—INCLUDING EXPENSES OF PAST SUPPORT.**—In a proper case payment of alimony may be made to date from the commencement of the action, thus including the expenses of the wife's past support, and where none of the evidence is brought up, so that the appellate court has no means of knowing whether the evidence did or did not show a necessity for such allowance for past support, every reasonable intendment must be indulged in favor of the correctness of the proceedings and the regularity of the order. (Id.)
5. **APPOINTMENT OF RECEIVER—SALE OF PROPERTY.**—Where, in an action for divorce, the court appoints a receiver to take charge of and sell the community property, the defendant is not injured by the action of such receiver in selling two cows which he claims were neither community property nor separate property of either spouse, but belonged to a stranger to the action. (*Scarpa v. Scarpa*, 345.)
6. **ATTORNEY'S FEE—ALLOWANCE BY COURT.**—In such a proceeding, the court has authority to make an order for the payment of a fee to the receiver's attorney. (Id.)
7. **ACCOUNT OF RECEIVER—ALLOWANCE—REVIEW—INSUFFICIENT RECORD.**—The appellate court cannot review the action of the trial court in allowing given items in the account of the receiver where the appellant fails to bring up the evidence concerning them. (Id.)
8. **STATUS OF PROPERTY—DETERMINATION BY COURT—WHEN RES ADJUDICATA.**—In an action for divorce, after the court has determined that certain property is community property, and more than six months has elapsed after such determination by the interlocutory decree of divorce, the status of the property becomes *res adjudicata* and not open to further attack. (Id.)
9. **COMMUNITY PROPERTY—JURISDICTION.**—In a proceeding in divorce, the court has jurisdiction to adjudge the character of any property claimed to be community property. (Id.)
10. **INTERLOCUTORY DECREE—DISPOSITION OF PROPERTY—WHEN FINAL.**—An interlocutory decree of divorce becomes final as to all dispositions of property made therein after the expiration of six months from the entry thereof. (Id.)
11. **DIVISION OF COMMUNITY PROPERTY—DUTY OF COURT.**—If the parties to a divorce proceeding have not agreed to a division of the community property, it is the duty of the court in which the divorce proceeding is pending to determine the relative interests of

DIVORCE (Continued).

the spouses in their common accumulation. (*Milekovich v. Quinn*, 537.)

12. **STIPULATION OF PARTIES—FRAUDULENT CONCEALMENT OF PROPERTY—SUBSEQUENT ACTION TO SECURE PROPERTY—DUTY OF PLAINTIFF—EQUITY.**—Where the husband in entering into a stipulation with reference to the division of the community property fraudulently keeps from the wife knowledge of the existence of certain community property, in a subsequent action by the wife to secure a division of such property, it is not necessary for her to offer to return to the defendant the property received by her under the original settlement; nor is it necessary in such action that the decree in the previous action of divorce be set aside, either in whole or in part. (*Id.*)
13. **UNTRUE STATEMENTS OF HUSBAND—MANNER OF MAKING IMMATERIAL.**—The fact that the only untrue statements made by the husband were contained in his pleading and in his affidavit filed in the wife's suit for divorce is immaterial where the wife was deceived thereby and was induced by such false statements to enter into the stipulation covering the division of the community property. (*Id.*)
14. **STIPULATION—JUDGMENT—ISSUES WITHDRAWN.**—Where the stipulation with reference to the division of the community property expressly provided that the property rights of the parties as therein set forth should be incorporated in the judgment, and the judgment expressly incorporated them, these matters were as effectually withdrawn from any judicial consideration as if they had been expressly withdrawn by stipulation. (*Id.*)
15. **FAILURE TO CROSS-EXAMINE—LACK OF DILIGENCE—SUBSEQUENT SUIT.**—Where, due to the fraudulent misrepresentations of the defendant in his pleading in the divorce action and to his having thereby secured from plaintiff a stipulation covering the settlement of their property interests, the plaintiff fails to cross-examine the defendant as to the community property, she is not thereby guilty of such negligence or lack of diligence as to bar her in a subsequent action from securing her proper share of the former community property. (*Id.*)
16. **ADULTERY—FINDINGS—EVIDENCE—APPEAL.**—Even though it be conceded that the trial court, in an action for divorce on the ground of adultery, should base its findings of guilt only upon evidence convincing to a moral certainty and beyond a reasonable doubt, it would still be the duty of the appellate court to give at least the same weight to the findings of the trial court as it does to the verdict of a jury in a criminal case. (*Broderick v. Broderick*, 550.)

DIVORCE (Continued).

17. **PROVINCE OF TRIAL JUDGE.**—The acts and conduct constituting adultery are of such a nature that an intelligent, observing, and experienced trial judge making full use of his opportunities to observe the conduct, temperament, manner, and appearance of the witnesses before him is in the nature of things more capable of reaching a just conclusion from the evidence than a court of review, even with the assistance of able and zealous counsel. (Id.)
18. **FALSE CHARGE OF ADULTERY IN FORMER ACTION—CRUELTY—CONDONATION—SUBSEQUENT MISCONDUCT.**—In such action, a false charge of adultery made in a former action which is set up as a ground of cruelty is not to be considered as stale, although the parties had subsequent to such former action lived together as husband and wife, where there was subsequent misconduct which caused, and was calculated to cause, great mental suffering. (Id.)
19. **CHARGE OF INFIDELITY—RELATIONS WITH OTHERS—ADMISSIBILITY OF LETTER.**—Where, in such action, the plaintiff alleged that the defendant had falsely accused her of infidelity and immorality, the court properly admitted in evidence letters written by the plaintiff to a person other than her husband which contained language that indicated that her relations with such person were of such a character as to leave her no cause for rightful complaint as to her husband's charge against her of infidelity. (Id.)
20. **CONDUCT OF PLAINTIFF—TESTIMONY OF EYE-WITNESSES.**—In such action, testimony of other persons that on different occasions they had seen the plaintiff lying on the same bed with the person to whom such letter had been written was likewise relevant and pertinent, tending to contradict the allegations of her complaint. (Id.)
21. **CHARGE OF FAILURE TO PROVIDE—REQUESTS FOR MONEY—ADMISSIBILITY OF LETTERS.**—Where, in such case, the plaintiff charged the defendant with willfully failing to provide, on cross-examination of the plaintiff the court properly permitted the introduction in evidence of a letter written by her to the defendant containing a request for money and which, in substance and tenor, tended to show the actual relations between the parties as regards money matters. (Id.)
22. **EVIDENCE—CROSS-EXAMINATION—TESTIMONY ADMISSIBLE.**—Rules of evidence are primarily rules of exclusion, and in this state the rule has never been so applied as to relieve a party when under cross-examination from his sworn obligation to tell the whole truth when it might in any degree tend to explain, qualify, or shed light on any relevant testimony given by him on direct examination. (Id.)
23. **REPUTATION IN PLACE OF FORMER RESIDENCE—ADMISSIBILITY.**—It is a question for the court to determine whether or not general
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reputation in a place of former residence is too remote in point of time to be allowed in evidence. (Id.)

24. **REPUTATION.**—Where, in an action for divorce on the ground of adultery, it appears that the witnesses have never discussed the reputation of the plaintiff "except in the family," their testimony might properly be stricken out on motion, if such motion be made. (Id.)
25. **ACTION FOR DIVORCE—MINUTE ENTRY OF DECISION—WANT OF FINDINGS—SUBSEQUENT ORDER NOT APPEALABLE.**—In an action for divorce, an order entered in the minutes of the court, after issue joined and trial, denying to both parties the relief prayed for, does not constitute a final judgment where findings have not previously been made and filed with the clerk, or been waived, and an order thereafter made denying plaintiff's motion for an order directing the clerk to issue an execution against the defendant for unpaid alimony is not appealable under section 963 of the Code of Civil Procedure. (Cuneo v. Cuneo, 564.)
26. **DESERTION—REFUSAL TO HAVE REASONABLE INTERCOURSE—INSUFFICIENT CORROBORATION.**—In an action for divorce on the ground of willful desertion based upon persistent refusal to have reasonable matrimonial intercourse as husband and wife, where the corroboration of the plaintiff's testimony was merely the testimony of other witnesses that the parties, though living in the same house, occupied separate bedrooms, it was not of the character and degree required by the code section relating to corroboration in divorce cases. (Ingraham v. Ingraham, 578.)
27. **EVIDENCE—DIFFICULTY TO CORROBORATE—EFFECT.**—While the secrets of the bedchamber are very frequently hard to substantiate by other witnesses than the parties themselves, nevertheless the parties to such divorce action are not thereby relieved from the necessity of complying with the mandate of the law respecting corroboration. (Id.)
28. **PHYSICAL CONDITION OF DEFENDANT—BURDEN OF PROOF.**—In this action for divorce on the ground of willful desertion based upon persistent refusal to have reasonable matrimonial intercourse as husband and wife, there was no testimony nor were any facts elicited, tending to show that the health or physical condition of the defendant did not make his refusal to have reasonable matrimonial intercourse reasonably necessary. The burden of establishing this fact rested on plaintiff. (Id.)
29. **PLEADING—SUFFICIENCY OF COMPLAINT.**—A complaint for divorce on the ground of willful desertion which contains the usual general allegation that "defendant willfully and without cause, or provocation, deserted and abandoned plaintiff, with intent to desert said plaintiff, and ever since said time has continued to live sepa-

DIVORCE (Continued).

rate and apart from plaintiff without her consent, and against her will, and with intent to desert and abandon her, and without fault of plaintiff," in the absence of a demurrer for a definite statement of the facts, is not subject to the objection for the first time on appeal that it does not inform defendant that the desertion was intended to be established under the first provision of section 96 of the Civil Code. (Id.)

30. FINAL DECREE—MOTION TO MODIFY—MATTERS REVIEWABLE.—

Upon a motion to modify a final decree of divorce in which the property rights of the parties and the alimony were left subject to future modification, it is only such facts as have arisen or become known to the party since its entry that may be made the basis of an attack upon its provisions. As to all other matters, it is as final as any other judgment or decree after the period for appeal has expired. (Bradley v. Bradley, 638.)

31. APPEAL—EXTRINSIC FACTS—RELIEF ALLOWABLE.—

Upon an appeal from an order modifying a final decree of divorce in which the property rights of the parties and the alimony were left subject to future modification, the appellant is not entitled to any relief from the appellate court because of the fact that since the entry of the modifying order appealed from that court had occasion to pass upon the merits of certain other appeals involving the property rights and interests of the parties. (Id.)

32. ACTION FOR DIVORCE—VENUE.—

The statute requires that an action for divorce must be brought in the county of the residence of the plaintiff. (Weyer v. Weyer, 765.)

33. JOINDER OF FRAUDULENT GRANTEE OF HUSBAND.—

A wife's action for divorce against her husband and her husband's brother, who is alleged to be the fraudulent grantee of the husband, wherein the wife, in addition to seeking a divorce, alimony, counsel fees, and costs, prays that the conveyance and transfer of her husband to his brother be decreed to be fraudulent and void as to her, and that a lien be imposed upon the property as security for the payment of such sums as may be directed by the court to be paid by the husband, does not constitute two causes of action; and such case is not within the provisions of section 5 of article VI of the constitution or section 392 of the Code of Civil Procedure relating to place of trial. (Id.)

34. EXISTENCE OF COMMUNITY PROPERTY—PLEADING—PROOF.—

In an action for divorce, in the absence of an allegation that there is community property, the presumption is that there is no community property. (Id.)

35. PROVISION FOR SUPPORT OF WIFE—LIABILITY OF SEPARATE PROPERTY OF HUSBAND.—

In an action for divorce, provision is to be

DIVORCE (Continued).

made for the wife, and where there is no community property, it must be from the separate property of the husband, either owned or to be acquired by him. No reason exists why either the wife or the chancellor should forego the certainty of recourse to property owned by the husband for the uncertainty of speculation regarding future earnings. (Id.)

36. **ALIMONY—FRAUDULENT CONVEYANCE BY HUSBAND.**—The husband cannot put his separate property out of his hands for the purpose of defeating his wife in an anticipated application for alimony. (Id.)

DRAFTS.

ACCEPTANCE AS AGENT—NONSUIT AS TO ALLEGED PRINCIPAL—AGENT NOT PARTY AGGRIEVED.—Where, in an action against one who has accepted a draft, the defendant answered alleging that in accepting the draft he acted as agent for a third party, who at the request of the acceptor was brought in and made a party defendant but without any affirmative relief being demanded against him by the original defendant, and the trial court thereupon granted a motion for a nonsuit of the party thus brought in, the original defendant, even conceding the ruling to be erroneous, was in no position to complain. (*Patten & Davies Lumber Co. v. Inman*, 111.)

EASEMENTS.

1. **GRANT—NONUSER.**—An easement founded on a grant cannot be lost by nonuser, no matter how long the nonuser may continue. (*Parker v. Swett*, 68.)
2. **ABANDONMENT.**—Such an easement may be lost by abandonment only when the intention to abandon clearly appears. (Id.)
3. **WATERS AND WATERCOURSES—RIGHT OF WAY FOR IRRIGATION DITCH—DESTRUCTION BY FLOOD—RECONSTRUCTION OVER NEW LINE—ERRONEOUS REFUSAL OF INJUNCTIVE RELIEF.**—After the washing out by flood of an open earthen ditch, by means of which the defendants in this action had acquired and had for many years enjoyed the right to conduct water over plaintiff's lands along a definite and well-established line from a point of diversion from a creek on plaintiff's land to lands of defendants below, where defendants used the water for irrigation, the defendants had no right to reconstruct and maintain a ditch of a different character on plaintiff's lands, along a line distant from twenty-five to forty feet from the former line, and the trial court after the reconstruction of the ditch by the defendants on the line last described, erred in refusing the plaintiff an injunction to restrain its maintenance, and in adjudging that de-

EASEMENTS (Continued).

- defendants had an easement in plaintiff's land for the construction and maintenance of the new ditch line. (*Felsenthal v. Warring*, 119.)
4. **NATURE OF EASEMENT.**—The defendant's right of way having been acquired either by prescription or while the plaintiff's land was still a part of the public unoccupied lands of the United States, the defendants' right in plaintiff's lands, whatever its source; was simply to continue the use thereof which they were enjoying at the time plaintiff acquired the land. (*Id.*)
5. **LOCATION OF DITCH PRIOR TO FLOOD—RIGHTS ACQUIRED THEREBY.**—The right of way for the ditch having been definitely fixed by the acts of the parties prior to the flood which washed it out, the defendants had acquired the right to that particular location and no other. (*Id.*)
6. **RECONSTRUCTION OF DITCH.**—On reconstructing the ditch after its destruction by flood, there was no principle of law that warranted the defendants subjecting to their use another and different portion of the plaintiff's land without his consent. (*Id.*)
7. **CHANGING LOCATION OF DITCH.**—The location of an easement of this character cannot be changed by either party without the other's consent after it has been finally established, whether by express grant or by prescription. (*Id.*)
8. **SLIGHT EXTENT OF CHANGE IMMATERIAL.**—The acquisition of a right of way over one portion of a person's land gives the grantee no right over any other portion, and it is immaterial that the new line for an irrigation ditch constructed after the washing out of an old one was only from twenty-five to forty feet distant from the old line. (*Id.*)
9. **CHANGE NOT WARRANTED BY SECTION 806 OF CIVIL CODE.**—Section 806 of the Civil Code, which provides that the "extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired," does not warrant the contention of the defendants that because they had acquired a right to divert water from a creek at a point of diversion, on plaintiff's land, they necessarily acquired as incident thereto a right of way for a ditch over the land, and that, therefore, if the way formerly used be destroyed by flood or other act of God, they may reconstruct the ditch along a new line, provided it be the one that will entail the least injury to the plaintiff's land. (*Id.*)
10. **CASE AT BAR—NATURE OF SERVITUDE.**—Where, as in the case at bar, the nature of the respondents' enjoyment of the servitude prior to the washing out of the ditch consisted in conducting water in an open earthen ditch that followed a certain well-defined and established course over appellant's land—a line that had been estab-

EASEMENTS (Continued).

lished for many years—that line and none other fixed the extent of the servitude that rested upon appellant's realty. (Id.)

11. **APPROPRIATION OF WATER ON GOVERNMENT LANDS—NATURE OF RIGHT.**—The right of an appropriator of water on government land that has since become private property to divert the water at any particular place of diversion and conduct it to his own land over the land that has passed into private ownership is the right of the grantee of an easement, including such secondary easements as are necessary for the full enjoyment of the primary easement, such as the right to enter on the servient tenement to make necessary repairs, but not to increase the burden on the servient tenement by any alteration in the mode of enjoyment of the primary easement. (Id.)
12. **SECONDARY EASEMENTS—CHANGING MODE OF ENJOYMENT.**—The right of secondary easement is not a right to change the mode of enjoyment, if such change increases the burden on the servient tenement, as by shifting the line of a ditch every time a flood or freshet washed away or ate into the bank of the stream. (Id.)
13. **RIGHT TO APPROPRIATE WATERS—RIGHT TO CONSTRUCT DITCH DOES NOT FOLLOW.**—The right to appropriate waters does not carry with it the right to burden the lands of another with a ditch, although the proposed appropriation cannot be effected without the ditch. (Id.)
14. **INJUNCTIVE RELIEF—MANDATORY INJUNCTION—GENERAL RULE.**—It is a general rule, to which there are a few well-recognized exceptions, that when one, without right, attempts to appropriate the property of another by conduct which will ripen into an easement, a court of equity will compel the trespasser to undo, so far as possible, what he has wrongfully done. (Id.)
15. **RESERVATION OF PERPETUAL RIGHT OF WAY—CONSTRUCTION.**—Where the owner of a tract of land conveys a strip thereof to another, reserving to himself, as an easement in favor of the remaining portion of the tract, a perpetual right of way over and across the strip conveyed, such reservation constitutes and reserves only an easement appurtenant to such remaining portion of the tract, and not an easement in gross in such grantor apart from his ownership of such portion. (Nilson v. Wahlstrom, 237.)
16. **RIGHT OF GRANTOR TO MAKE LATER CONVEYANCE.**—As such a reservation embraces only an easement appurtenant to a particular tract of land, the grantor has nothing in the way of an easement in gross which he can later convey to the owners of other tracts of land. (Id.)
17. **ADVERSE USER—PERMISSIVE USE.**—A right of way by adverse user or prescription cannot be based upon a permissive use of the road. (Nay v. Bernard, 364.)

EASEMENTS (Continued).

18. **RESERVATION IN GRANT—APPURTENANT TO DOMINANT TENEMENT—PAROL EVIDENCE.**—An easement conveyed by an express grant may be shown to be appurtenant to a dominant tenement by reason of facts appearing *aliunde* the deed, notwithstanding a description of such dominant tenement is not contained in the grant. (Id.)
19. **DIVISION OF LANDS—QUASI EASEMENTS.**—Where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it, as between it and the property which the vendor retains. (Id.)
20. **IMPLIED RIGHTS OF WAY—KNOWLEDGE OF PARTIES.**—In this state, the doctrine of implied right of way is not limited to cases of rights of way by necessity, but applies whenever the *quasi* easement is obviously apparent or the parties had knowledge of its existence. (Id.)
21. **RESERVATION OF QUASI EASEMENT—EFFECT OF OTHER RESERVATIONS.**—A *quasi* easement reserved to the grantor upon the severance of his estate will not be affected by an express reservation of another right of way for another purpose, especially when the latter reservation is a right of way for future use. (Id.)
22. **CONSTRUCTION OF EASEMENT—SUBSEQUENT CONVEYANCE—REFERENCE TO IN DEED.**—In this action to establish a right of way, the easements involved were appurtenant to the land retained by the common predecessor of the parties at the time of his severance of the tract over which the right of way was reserved and passed by the subsequent conveyance of the land originally retained without particular reference thereto in the deed. (Id.)
23. **SUIT TO ESTABLISH—DIRECTED JUDGMENT BY APPELLATE COURT.**—On appeal from a judgment in favor of the defendant in an action to establish such right of way, although the conclusions of the appellate court may be in favor of the appellant's title, it cannot direct the entry of a judgment in his favor in the absence of findings as to the existence and use of the road prior to the execution of the deed to the servient tenement. (Id.)

See Judgments, 3; Partition; Quieting Title, 2.

ELECTION. See Employer and Employee, 2, 3.

EMINENT DOMAIN.

1. **ENCUMBRANCES—IMPLIED COVENANTS.**—Where property is taken by a proceeding in eminent domain, there is no implied covenant, as in a voluntary conveyance by grant, against encumbrances or liens. (Marin M. W. Dist. v. North Coast W. Co., 260.)

EMINENT DOMAIN (Continued).

2. **PAYMENT OF LIENS — RIGHT TO DEDUCT FROM JUDGMENT — CONSTRUCTION OF SECTION 1248, CODE OF CIVIL PROCEDURE.**—Section 1248 of the Code of Civil Procedure gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid. (Id.)
3. **PAYMENT IN FULL TO OWNER—RIGHT OF RECOVERY.**—Section 1712 of the Civil Code does not give such a right of recovery where the person taking property by proceedings in eminent domain has paid the full purchase price to the owner of the land. (Id.)
4. **CONDEMNATION OF LAND SUBJECT TO TAX—DUTY OF OWNER TO PAY.**—Where a municipal water district condemns certain land and, pursuant to proceedings had in accordance with section 1254 of the Code of Civil Procedure, is let into possession thereof, there is no obligation on the part of the owner to pay the taxes which are due and a lien on the land, but not delinquent, at the time of the transfer. (Id.)

EMPLOYER AND EMPLOYEE.

1. **DEATH OF EMPLOYEE — ACTION FOR DAMAGES — ROSEBERRY ACT — ELECTION TO ACCEPT PROVISIONS—CONSTRUCTION OF ACT.**—In this action for damages for the death of an employee, who was employed at a daily wage by one who at the time of the employment was not subject to the provisions of the Roseberry Act (Stats. 1911, p. 796), but who elected to accept the provisions of the act seventeen days before the accident in which the employee was killed, it is held that the failure of the employee when the employer accepted the provisions of the act, to give notice in writing that he, the employee, elected not to become subject to the act, did not render him subject to its compensation provisions, since subdivision 2 of section 7 of the Roseberry Act has reference to the time of the employee's entering into the "contract of hire" mentioned in that section, and not to any automatic renewal each day of the contract of hire by going to work each morning. (Lemley v. Doak Gas Engine Co., 146.)
2. **EMPLOYEE'S TIME TO ELECT.**—The section of the Roseberry Act referred to plainly contemplated that an employee, under such circumstances as those in the present case, should have thirty days after the acceptance by the employer of the provisions of the act within which to elect whether he, the employee, would be bound by the act or not. (Id.)
3. **EMPLOYEE'S FAILURE TO ELECT.**—Failure of the employee to elect not to be bound for seventeen days after the employer became

EMPLOYER AND EMPLOYEE (Continued).

subject to the act was not an acceptance of the provisions of the act on his part, since the employee had thirty days within which to make such election. (Id.)

4. **LIABILITY FOR TORTS.**—Where a servant, acting within the general scope of his employment and authority, injures one, the employer may be held liable. (Grantham v. Ordway, 758.)
5. **DRIVING OF AUTOMOBILE—SCOPE OF EMPLOYMENT—PRESUMPTION—CONFLICTING EVIDENCE—QUESTION FOR JURY.**—Where it is admitted that the automobile which struck the plaintiff belonged to the defendant employer and that the person driving was its employee, the presumption arises that such person was acting within the general scope of his authority; and such presumption is not destroyed as a matter of law by the testimony of such employee that he was acting on his personal business. The question of whether he was so acting becomes a question of fact for the jury to decide. (Id.)
6. **NEGLIGENCE—PERSONAL INJURIES BY AUTOMOBILE—ACTION FOR DAMAGES—PRIMA FACIE CASE AGAINST EMPLOYER—NONSUIT—ERROR.**—In an action for damages for personal injuries received through being struck by an automobile driven by an employee of a corporation, proof of the ownership of the automobile by the corporation and its operation at the time of the accident by such employee establishes a *prima facie* case against the corporation; and where the testimony of such employee is not so convincing, or free from justifiable doubt, as to amount to an admission by the plaintiff, who offers his testimony in evidence, or to eliminate the presumption that such employee at the time of the collision was engaged upon the business of his employer, the trial court commits error in granting a nonsuit as to the corporation. (Id.)

See Workmen's Compensation Act, 4, 5.

ENCUMBRANCES. See Eminent Domain, 2, 3.

EQUITY.

PLEADING.—Before a court of equity can intervene, it is necessary to allege the facts entitling plaintiff to the relief sought. (Johnson v. Wunner, 484.)

See Account Stated, 1; Easements, 14; Judgments, 5; Receivers, 1; Taxation, 3.

ESTATES OF DECEASED PERSONS.

1. **ACTION TO ENJOIN DISTRIBUTION—FINAL DECREE.**—An action will not lie to enjoin an administrator from delivering property under a decree of distribution upon the ground alleged in the complaint that the plaintiff is an illiterate aged woman, a nonresident, and had no knowledge of the death of the decedent or of the probate

ESTATES OF DECEASED PERSONS (Continued).

proceedings until long after the time for an appeal from the decree had expired, there being no claim that due and legal notice of the hearing of the petition had not been given nor any claim made of the existence of any fiduciary relation between plaintiff and defendant, or of the existence of extrinsic or collateral fraud. (*Beltran v. Hynes*, 177.)

2. PROBATE HOMESTEAD—ERRONEOUS DECREE—COLLATERAL ATTACK.—

A decree made in the course of probate proceedings, upon the petition of the guardian of minor children of the deceased, and after due notice and hearing, setting apart absolutely in fee to such minor children certain separate property of the deceased, though erroneous, cannot be indirectly attacked. (*Fergodo v. Donohue*, 670.)

ESTOPPEL.

See Banks and Banking, 9; Contracts, 13, 14; Deeds of Trust, 2; Mechanics' Liens, 11; Pleading, 13; Quieting Title, 7; Streets, 4.

ESTRAYS. See Animals.

EVICTION. See Landlord and Tenant, 9, 10.

EVIDENCE.

1. EXPERT OPINION—ACTION FOR DAMAGES FOR DEATH—BURSTING OF FLY-WHEEL—CAUSE OF ACCIDENT.—In an action for damages for a death due to the breaking of a fly-wheel while an engine was being tested, it was not improper to ask a witness who had assisted in making the tests and had testified fully regarding all the facts and circumstances surrounding the accident: "What, in your opinion caused that fly-wheel to break?" (*Lemley v. Doak Gas Engine Co.*, 146.)
2. QUESTION OF FACT—EVIDENCE—CREDIBILITY OF WITNESSES AND WEIGHT OF TESTIMONY.—It is within the province of the trial court to determine the credibility of witnesses and the weight to be given to their testimony; it is the duty of an appellate court to harmonize apparent inconsistencies in the statements of the witnesses, and to do this it will indulge in every reasonable presumption of fact. (*Powell v. Powell*, 155.)
3. INHERENT IMPROBABILITY—LACK OF SUBSTANTIAL EVIDENCE.—To warrant an appellate court in determining there is no substantial evidence because of inherent improbability, there must exist either a physical impossibility of the evidence being true or a state of facts so clearly apparent that nothing need be assumed nor any inferences drawn to convince the ordinary mind of the falsity of the story. (*Id.*)

EVIDENCE (Continued).

4. **MUNICIPAL ORDINANCES—JUDICIAL NOTICE.**—Courts of record do not take judicial notice of municipal ordinances in this state. (Church v. Grady, 194.)
5. **COMMUNICABILITY OF DISEASE—JUDICIAL NOTICE.**—The courts may not take judicial notice that gonococcus infection is noncommunicable except by actual contact. (In re Johnson, 242.)
6. **UNCONTRADICTED TESTIMONY—IMPEACHMENT—WEIGHT.**—A trial court is not legally bound to accept all testimony adduced before it at its face value, or as conclusive, merely because there is no testimony offered and received in contradiction of it. The manner in which a witness may testify often operates as effectually in the impeachment of the verity of his testimony as would affirmative contradiction thereof by other testimony. (Richey v. Butler, 314.)
7. **QUESTIONS OF FACT—TESTS AVAILABLE—APPEAL—REVIEW.**—The tests available to trial judges and juries for determining questions of fact are obviously not available to reviewing tribunals, and, therefore, when a trial court or jury reaches a conclusion upon the facts, such conclusion is rarely reviewable, and only so when the questions of fact are of such a character from the nature of the evidence as to resolve them into questions of law. (Id.)
8. **ACTION TO FORECLOSE MORTGAGE—FRAUD AS DEFENSE—REJECTION OF DEFENDANT'S TESTIMONY—DISCRETION.**—In this action to foreclose a purchase-money mortgage, the only evidence offered in support of a special defense of fraud in the concealment of the existence of a prior mortgage having been the testimony of the defendant, the situation was not such as to warrant the appellate court in saying that the trial court committed error or an abuse of sound judicial discretion in refusing to accept the defendant's story. (Id.)
9. **CONTRADICTORY STATEMENTS—WEIGHT.**—Contradictory statements of the plaintiff in an action for damages for personal injuries do not necessarily nullify his testimony; but the weight to be given it might be lessened by such contradictions or the jury might reject the testimony entirely. (Olcese v. Hardy, 323.)
10. **DUTY OF APPELLATE COURT.**—It is the duty of an appellate court to reconcile apparent contradictions in evidence whenever possible. (Id.)
11. **NEGLIGENCE—ACTION FOR PERSONAL INJURIES—ASSUMPTION OF RISK—DEFENSE.**—In an action against the employer for damages for personal injuries received while the Roseberry Act was in force, evidence going to the defense of assumption of risk by the employee could be of no avail to such employer. (Id.)
12. **CONFLICT—APPELLATE REVIEW.**—Where there is a substantial conflict in the evidence, the appellate court is precluded from disturbing the verdict. (Id.)

EVIDENCE (Continued).

13. **SUFFICIENCY—VERDICT.**—There is no fixed standard for the sufficiency of evidence to induce belief, and unless the evidence so clearly preponderates against the verdict that the court cannot conclude that the verdict was the result of a due consideration of the evidence, the verdict will not be disturbed. (*Id.*)
14. **PRESUMPTIONS.**—Whenever under a given state of facts a presumption arises, such presumption is itself evidence. (*Grantham v. Ordway*, 758.)
15. **CONFLICT OF EVIDENCE.**—A presumption, even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact (*Id.*)

See Account Stated, 6, 8; Appeal, 30; Brokers, 8; Community Property; Contracts, 24, 25, 28, 34; Corporations, 8, 10, 14, 15; Criminal Law, 1-3, 5, 12-14, 24-26, 28; Divorce, 19-24, 26-28; Fraternal Insurance, 1, 2; Fraudulent Conveyances, 4; Guaranty, 1; Life Insurance, 1-3; Malicious Prosecution, 1-3; Mechanics' Liens, 3, 6, 15, 18, 20, 24; Negligence, 2-5, 6, 9, 10, 12, 15, 16, 24-26, 28, 29, 31-33; Partnership, 1, 2; Quieting Title, 8; Receivers, 2; Riparian Owners, 2; Street Law, 2; Title; Trial.

EXCEPTIONS. See Appeal, 21.

EXECUTION. See Divorce, 25; Mandamus; Prohibition.

EXECUTION SALES.

1. **SALE OF PROPERTY—THIRD PARTY CLAIMS—DUTY OF SHERIFF TO ADJUDICATE.**—It is not incumbent on the sheriff as a legal duty to settle any disputes which, after a sale on execution and the delivery by him to the purchasers of a certificate of sale, might arise between such purchasers and third parties as to the right to the possession of the property. (*Dreisbach v. Braden*, 407.)
2. **BULKY PROPERTY—SYMBOLICAL DELIVERY.**—Where, as in this action, the property which is the subject matter of the execution sale is of that character and of such bulk in quantity that it is not capable of manual delivery, the sheriff, in the sale thereof, is only required, under section 699 of the Code of Civil Procedure, to make a symbolical delivery thereof to the purchasers. (*Id.*)
3. **THIRD PARTY AS AGENT FOR SHERIFF—EVIDENCE.**—In this action against a sheriff and the surety on his official bond for alleged failure to deliver certain property sold to the plaintiffs at an execution sale, the contention of such plaintiffs that a third party who had claimed a lien on the property was the custodian of the prop-

EXECUTION SALES (Continued).

erty as the appointee and agent of the sheriff was not supported by the evidence—the facts being that a deputy sheriff was placed in charge of the property under a writ of attachment and remained in the capacity of keeper of the property until it was sold to the plaintiffs to satisfy their judgment, the property merely having been allowed to remain in a shed of such third party where it was located at the time of the levy. (Id.)

See Injunction, 1.

FINDINGS.

1. **CONCLUSION OF LAW—HARMLESS ERROR.**—In an action to recover upon a promissory note, a finding “that no part of the principal sum or the interest on said promissory note is due or owing” is a conclusion of law, but where there was no delivery of, nor consideration for, the note, the finding is not prejudicial. (*National Bk. of San Mateo v. Whitney*, 276.)
2. **CONSTRUCTION OF.**—Findings must be construed together to uphold the judgment entered upon them. (Id.)
3. **FINDINGS OUTSIDE ISSUES—WAIVER.**—While a finding of fact not in issue is sometimes upheld upon the theory that the parties have waived the point by their failure to object to the evidence, the rule cannot be extended to the justification of a finding in favor of a party contrary to his allegation, which allegation is not denied by his adversary. (*Ahlman v. Barber Asphalt Pav. Co.*, 395.)
4. **CONFLICT—CONSTRUCTION OF.**—The findings of the trial court are to be liberally construed in support of the judgment, and all the findings are to be read together. If possible, they are to be reconciled so as to prevent any conflict on material points. (*Adler v. Sawyer*, 778.)

See Appeal, 7, 18; Attorney at Law, 2; Divorce, 16; Evidence, 15; Judgments, 8, 16; Mechanics' Liens, 2, 9, 21; Negligence, 24; Quieting Title, 11; Street Law, 5, 10.

FIRE INSURANCE. See Appeal, 31.

FORFEITURE. See Corporations, 14.

FRATERNAL INSURANCE.

1. **ACTION ON POLICY—BREACH OF WARRANTY—BURDEN OF PROOF.**—In an action to recover upon a fraternal insurance policy, the burden of proving the falsity of the representations made by the insured upon which the policy was issued devolved upon the defendant. (*Mickschil v. National Council*, etc., 100.)

FRATERNAL INSURANCE (Continued).

2. CAUSE OF DEATH OF MOTHER OF INSURED.—Where, in an action on a fraternal insurance policy, the defense was breach of warranty by the insured in making a false representation that her mother died of pneumonia when she had in fact died of pulmonary tuberculosis, the finding of the court to the effect that the mother's death was caused by pneumonia was supported by the evidence. (Id.)

FRAUD.

KNOWINGLY MAKING FALSE STATEMENTS—EFFECT.—One who makes statements false in fact, and induces another to buy property, cannot defeat liability for the false statements by showing that if the other party had suspected him of falsehood or doubted the accuracy of the statements, such party, by ordinary diligence and by inquiry of persons whom he knew to be cognizant of the truth, could have learned of the accuracy or falsity of the statements. (Shermaster v. California Bldg. etc. Co., 661.)

See Account Stated, 1; Contracts, 25; Divorce, 12-15; Streets, 3, 4.

FRAUDULENT CONVEYANCES.

1. SALES WITHOUT IMMEDIATE DELIVERY AND CHANGE OF POSSESSION.—A sale of personal property, though not followed by immediate delivery and actual and continued change of possession as required by section 3440 of the Civil Code, is not a nullity, but is good against all the world except the creditors of the vendor, and is good against them except when attacked in proceedings for the collection of their debts. (Garn v. Thorwaldson, 62.)
2. ACTION TO SET ASIDE TRANSFER—SUFFICIENCY OF COMPLAINT—WAIVER OF OBJECTION.—In an action to vacate and set aside a conveyance of real property alleged to have been made to obstruct and prevent plaintiff from satisfying a certain money judgment theretofore obtained against two of the defendants, if the allegations of the complaint do not definitely show that the conveyance was made in such manner and under such circumstances as to show its fraudulent intent, but the demurrer thereto is general and no objection is urged to the evidence introduced to establish the fraud, on appeal from the judgment the point must be deemed to have been waived. (Johns v. Baender, 790.)
3. DEFRAUDING CREDITORS—CONVEYANCE VOID.—If a conveyance be made with the intent to defraud creditors, it is void, notwithstanding that the debtor has other property ample in amount to satisfy his creditor. (Id.)
4. ACTION TO SET ASIDE TRANSFER—EVIDENCE—ADMISSIBILITY OF DIVORCE COMPLAINT.—In an action to set aside a conveyance

FRAUDULENT CONVEYANCES (Continued).

alleged to have been made with the intent to prevent plaintiff from satisfying a judgment theretofore obtained, a divorce complaint filed by one of the judgment debtors wherein the property alleged to have been thus fraudulently conveyed is alleged to be community property of herself and husband, the other judgment debtor, is not privileged; and where it is admitted in evidence without objection, said defendants cannot on appeal be heard to complain of its admission. (Id.)

See Contracts, 2; Divorce, 36.

GIFTS. See Contracts, 42.

GUARANTY.

1. **CONSTRUCTION—UNCERTAINTY—CONTINUING OR SPECIFIC GUARANTY—EVIDENCE—RESORT TO SURROUNDING CIRCUMSTANCES.**—In this action on a guaranty, where there was uncertainty as to whether the parties intended the instrument to be a continuing guaranty, limited in amount, or a guaranty of one particular transaction, the court had to resort to the circumstances under which the instrument was executed. (R. N. Nason & Co. v. Kennedy, 159.)
2. **APPLICATION OF PAYMENTS.**—Where a merchant sells goods to a customer under a guaranty, and afterward sells him other goods, the first money received should be applied on the sales covered by the guaranty. (Id.)
3. **PRESUMPTION AGAINST CONTINUING GUARANTY.**—In every doubtful case the presumption ought to be against holding a guaranty to be continuing. (Id.)
4. **GUARANTY NOT CONTINUING—FINDING SUPPORTED BY EVIDENCE.** The evidence in this case supports the finding that the guaranty was not continuing, but was intended to cover the initial order of goods only. (Id.)
5. **SURETY OF LESSEE—CONSTRUCTION OF CODE SECTIONS.**—Sections 594–596, inclusive, of the Political Code are intended to apply exclusively to the conduct of the business of insurance as such, and their provisions cannot be stretched to cover the case of a single contract of guaranty, such as where one person acts as surety upon a bond guaranteeing the faithful performance on the part of a lessee of the covenants of a written lease. (James Eva Estate v. Oakland B. & M. Co., 515.)

HOMESTEAD. See Mortgages, 12, 13.

HUSBAND AND WIFE. See Judgments, 10; Mortgages, 6, 9, 10.

INDEMNITY. See Contracts, 41; Promissory Notes, 2.

INDORSEMENT. See Street Law, 15.

INJUNCTION.

1. **RESTRAINING SALE OF REAL PROPERTY BY EXECUTION.**—Where a wife is the owner of the legal title to real property by deed of gift from her husband, and is in possession thereof and her title has been established as perfectly valid by a solemn judgment, in an action wherein its validity was directly challenged, an injunction will lie at her instance to restrain a sale of the property under an execution issued on a judgment against the husband in favor of the daughter of the husband and wife for the support and maintenance of the daughter. (*Murphy v. Riecks*, 1.)
2. **EXCEPTIONS.**—A court of equity may decline to issue a mandatory injunction where the defendant is engaged in a business that serves the public, or where, by innocent mistake, erections have been placed a little upon plaintiff's land, and the damage caused to defendant by their removal would be greatly disproportionate to the injury of which the plaintiff complains. (*Felsenthal v. Warring*, 119.)
3. **SUBSTANTIAL INJURY TO JUSTIFY INJUNCTION.**—To justify an injunction, there must be substantial injury, which, however, does not necessarily involve substantial damage. (*Id.*)
4. **COMPARATIVE INJURY FROM GRANTING AND WITHHOLDING—BALANCING OF CONVENIENCES.**—The rule that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction has no application where the act complained of is in its incidents tortious; there can be no balancing of conveniences when such balancing involves the preservation of an established right, however small, which will be extinguished if relief be not granted against one who would destroy it. (*Id.*)
5. **INJURY TO LAND—NUISANCE PER SE—INJUNCTION NOT DEPENDENT ON EXTENT OF PECUNIARY DAMAGE.**—In case of an injury to the land of another that is a nuisance *per se*, the right to an injunction does not depend upon the extent of the damage measured by a money standard, and the maxim, *De minimis*, etc., has no application. (*Id.*)
6. **BALANCE OF CONVENIENCE—DOCTRINE INAPPLICABLE TO FINAL DECREES.**—The doctrine of "balance of convenience" though frequently determinative of the propriety of granting or refusing preliminary injunctions, has no application to final decrees on hearing on plenary proofs. (*Id.*)
7. **POINTS AND AUTHORITIES—SECTION 527, CODE OF CIVIL PROCEDURE.**—Where a temporary restraining order, granted without

INJUNCTION (Continued).

notice, has been vacated and set aside, the points and authorities served for use at the hearing cannot at a subsequent hearing be deemed a compliance with the statute, which in absolute terms requires the applicant for an injunction to serve upon the opposite party at least two days prior to such hearing a copy of his points and authorities. (*Kelsey v. Superior Court*, 229.)

8. **SECTION 527, CODE OF CIVIL PROCEDURE—DELAY IN HEARING—DISSOLUTION OF ORDER.**—Under section 527 of the Code of Civil Procedure, the court has no power to continue the hearing of a provisional injunction until some later date, but if the applicant is not ready to proceed, the court must dissolve the temporary restraining order. (*Id.*)
9. **HEARING CONTINUED—COURT DIVESTED OF JURISDICTION.**—Where in such case the court made an order continuing the hearing, it thereby divested itself of jurisdiction to take any action other than to dissolve the restraining order issued. (*Id.*)

See Easements, 14; Estates of Deceased Persons, 1; Prohibition.

INSTRUCTIONS. See Corporations, 15; Criminal Law, 4, 12, 15-17, 20, 21; Negligence, 14, 18, 20, 22, 23, 27.

INSURANCE.

1. **REINSURANCE—ACTION ON POLICY—PLEADING.**—In an action against an insurance company and its reinsurer, an allegation that a certain reinsurance agreement was made "under the terms of which said . . . [reinsurer] reinsured all of the outstanding liability of defendant . . . [insurance company]," standing by itself does not show that such an agreement was made as to make the reinsurer liable to plaintiff for damages for personal injuries suffered by him while he was being conveyed as a passenger in an automobile, the driver of which carried insurance protection by policy issued by the defendant insurance company. (*Grbavach v. Casualty Co. of America*, 376.)
2. **INTEREST OF INSURED IN REINSURANCE.**—The original insured has no interest in a contract of reinsurance. (*Id.*)
3. **ACTION AGAINST REINSURER—CONDITIONAL REINSURANCE—INSUFFICIENT EVIDENCE.**—In an action against an insurance company and its reinsurer, the evidence is insufficient to show any liability against the latter, where the only evidence offered is the contract of reinsurance, which provides that the reinsurer will adjust and settle the claims and losses of the insurance company in consideration of the assignment to such reinsurer in cash or securities of an amount equal and corresponding to the aggregate amount of the company's

INSURANCE (Continued).

legal loss reserves as of a certain date, and no proof is made of compliance with such provision of the contract. (Id.)

See Fraternal Insurance; Life Insurance.

INTENT. See Criminal Law, 15.

INTEREST. See Appeal, 32.

JUDGMENTS.

1. JUDGMENT FOR MAINTENANCE—LIEN ON REAL PROPERTY.—A judgment in an action for maintenance and support limited to exist in its operative effect to a specified time becomes *functus officio* at the expiration of that time, and ceases to be a lien upon the real property of the defendant. (Murphy v. Riecks, 1.)
2. MONEY HAD AND RECEIVED—AFFIRMATIVE ISSUE RAISED BY ANSWER.—In an action for money had and received, where the answer admitted the receipt of the money and set up affirmative matters in defense, the judgment, based upon findings adverse to the defendant as to the affirmative matters, is a judgment upon a cause of action set forth in the complaint, and not upon one which appears for the first time in the answer. (Buperd v. Hunter, 96.)
3. JUDGMENT AND FINDINGS IN FAVOR OF DEFENDANTS ERRONEOUS. In this action to enjoin the defendants from maintaining a reconstructed irrigation ditch on land of the plaintiff other than that over which the record shows they had acquired an easement, the judgment and findings that the defendants are the owners of an easement in that part of the plaintiff's land and enjoining the plaintiff from asserting any right adverse to that easement are alike erroneous. (Felsenthal v. Warring, 119.)
4. AWARD OF CERTAIN NUMBER OF INCHES—MEANING.—An award of sixty inches in a decree in such case means sixty inches "constant flow." (Id.)
5. ACTION TO SET ASIDE—DEFECTIVE PROOF OF SERVICE—EQUITY.—A bill in equity to set aside a judgment upon the ground that proof of service of summons in the action in which such judgment was obtained failed to show that it was served upon each of the plaintiffs (the defendants in the prior action), must show that the plaintiffs were not in fact served with summons as required by section 410 of the Code of Civil Procedure, and that they, as defendants in said prior action, have a good defense on the merits thereof. (Celiano v. Giordanengo, 219.)
6. SUMMONS—DEFECTIVE RETURN—EQUITY.—A defective return of process duly served is not sufficient ground for equity to interfere. (Id.)

JUDGMENTS (Continued).

7. **ACTION TO SET ASIDE—INDIRECT ATTACK.**—A judgment at law in a prior action between the same parties is not *res adjudicata* on the issues in a subsequent suit in equity to set aside such judgment. While this is not a direct attack upon the judgment, neither is it collateral, but is properly designated as an indirect attack. (*Patterson v. Almond City Land etc. Co.*, 285.)
8. **FINDINGS AND CONCLUSIONS.**—Findings of fact, and conclusions of law do not constitute a judgment. (*San Diego Inv. Co. v. Crane*, 393.)
9. **APPEAL FROM JUDGMENT—DISMISSAL.**—Where no judgment appears in the judgment-roll as printed in the transcript, a purported appeal from a judgment will be dismissed. (*Id.*)
10. **PARTIES—ACTION AGAINST WIFE—JOINDER OF HUSBAND.**—In an action against a married woman in which her husband is joined as a party defendant merely because he is such husband, no judgment should be entered against him. (*Blessing v. Fetters*, 471.)
11. **TENDER OF PAYMENT—DEPOSIT WITH CLERK—INTEREST—SATISFACTION.**—A deposit with the clerk of the court of the amount of a judgment and notification to the judgment creditor that the same is there subject to its demand does not constitute a legal tender; and even if it did constitute a legal tender, it would be unavailing to satisfy the judgment where a small amount of interest on the judgment is not included. (*Rauer's Law etc. Co. v. S. Proctor Co.*, 524.)
12. **APPEAL—DISSOLUTION OF PARTNERSHIP—INTERLOCUTORY DECREE.** In an action for the dissolution of a partnership and for a partnership accounting, a decree determining that a partnership had existed prior to the time the defendant had breached the partnership agreement and that plaintiff is entitled to a decree dissolving the partnership, to an accounting from the defendant of all the profits thereof since the breach, and to have all the property of the partnership, including the goodwill thereof, sold and the proceeds equally divided between them, but leaving for future determination and adjudication the question as to the proceeds and profits accruing and derived from the business of the partnership which were received by the defendant and converted by him to his own exclusive use, is merely an interlocutory decree from which an appeal will not lie. (*Gianelli v. Briscoe*, 532.)
13. **WHEN FINAL.**—A judgment is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. (*Id.*)
14. **GENERAL VERDICT—DISSATISFACTION WITH—REMEDY.**—Where in such action the jury returned a general verdict for a lump sum,

JUDGMENTS (Continued).

no mention being made of either the value of the land or interest thereon, if plaintiff was dissatisfied *with the judgment entered in accordance therewith*, he had a direct remedy by motion for a new trial or by appeal. (*Conlin v. Southern Pacific R. R. Co.*, 743.)

15. ACQUIESCENCE IN—WAIVER OF OBJECTIONS.—If a person voluntarily acquiesces in, or recognizes the validity of a judgment, order or decree, or otherwise takes a position which is inconsistent with the right of appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court. (*Id.*)
16. REVERSAL—CONFLICTING FINDINGS.—A judgment will not be reversed on the ground of conflict in the findings unless the findings are incapable of being harmoniously construed. (*Adler v. Sawyer*, 778.)

See Appeal, 32; Bankruptcy; Contracts, 27; Divorce, 10, 30; Easements, 23; Estates of Deceased Persons, 2; Parties; Public Officers, 4.

JURIES AND JURORS. See Criminal Law, 23.

JURISDICTION. See Appeal, 23, 24; Injunction, 9; Supplementary Proceedings, 4.

JUSTICE'S COURT. See Appeal, 22.

LACHES. See Divorce, 15, 18.

LANDLORD AND TENANT.

1. EVICTION—GENERAL DEMURRER.—In this action by a tenant for damages, pleaded in two counts, it is held that a cause of action is stated in the complaint which is good as against a general demurrer. (*Hamer v. Ellis*, 57.)
2. TERMINATION OF LEASE—DESTRUCTION OF BUILDINGS.—A lease of land with buildings thereon is not terminated by the destruction of the buildings, unless it is so provided by contract or by statute. (*Id.*)
3. DESTRUCTION OF "THING HIRED"—LAND WITH SEVERAL STRUCTURES THEREON.—Although under section 1933 of the Civil Code the hiring of a thing terminates with the destruction of the thing hired, that result may not follow the destruction of a building where leased land has several structures thereon, since the building destroyed may not have been the "thing hired." (*Id.*)
4. EVICTION—DAMAGES—FUTURE PROFITS.—An eviction entitles the plaintiff in an action therefor to recover any damage he may have suffered thereby, including loss of future profits if ascertainable with reasonable certainty. (*Id.*)

LANDLORD AND TENANT (Continued).

5. **PLEADING SPECIAL DAMAGES—OTHER DAMAGE NOT PRECLUDED.**—The pleading of special damage from loss of future profits does not preclude the recovery of any other damage sustained. (Id.)
6. **DAMAGE BY ELEMENTS—COVENANT TO REPAIR.**—A covenant to repair in case of extensive damage by the "elements" does not include rebuilding structures destroyed by fire, "damage by the elements" being the equivalent of the phrase "act of God," such as lightning or other superhuman agency. (Id.)
7. **SERVICE OF NOTICE ON ASSIGNEES—RECOGNITION OF TENANCY.**—The fact that a lessor serves on the assignees of the lessee the statutory three days' notice to pay the rent then due or surrender possession of the premises shows that such lessor recognizes the tenancy of such assignees. (*Guaranty Trust etc. Bank v. Marsh*, 292.)
8. **EVICTON—TERMINATION OF LEASE—RECOVERY OF DEPOSIT.**—In this action brought by a successor in interest of a tenant to recover from the landlord moneys deposited as security for the performance of the covenants of the lease, upon the claim that there had been an eviction of the tenant by the landlord and consequent termination of the lease, there was sufficient evidence to justify the finding of the trial court that there was a termination of the lease by eviction, and consequently the landlord was not entitled to retain the deposit. (*Blessing v. Fetters*, 471.)
9. **CONSTRUCTIVE EVICTON.**—Any intentional and injurious interference by the landlord which deprives the tenant of the means or the power of beneficial enjoyment of the demised premises or any part thereof, or materially impairs such beneficial enjoyment, is a constructive eviction. (Id.)
10. **RETENTION OF DEPOSIT.**—A landlord is not entitled to retain a deposit given to secure certain covenants after the termination of the lease by eviction. (Id.)
11. **ASSIGNMENT OF LEASE—BREACH OF COVENANT—FORFEITURE.**—Although an assignment of a half interest in a lease to a person with whom a partnership had been formed and its subsequent use by the partnership was without the written consent of the landlord and in violation of a covenant in the lease, it did not create a forfeiture of the lease, especially after the landlord accepted the rent with knowledge of the assignment. (Id.)
12. **BANKRUPTCY OF PARTNER—RIGHT TO POSSESSION.**—Even after such assignee filed his petition in bankruptcy, the original lessee was entitled to hold possession and to have someone on the premises on his behalf, not only under his right as original lessee but also as the remaining solvent partner, until he consented to have the partnership property administered in bankruptcy. (Id.)

See Leases.

LAW OF CASE.

SECOND TRIAL—DIFFERENT FACTS.—The decision rendered by a trial court on a second trial after an appeal is not in conflict with the "law of the case" as established on the former appeal, when the case on second trial as shown by the findings is very materially different in its facts from the case as stated in the former decision by the appellate court. (*Beckett v. Stuart*, 108.)

LEASES.

1. **LANDLORD AND TENANT—LEASE OF PART OF BUILDING—INCIDENTS THERETO.**—A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. (*Runyon v. City of Los Angeles*, 383.)
2. **LEASE OF STORE—APPURTENANCES.**—The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease. (*Id.*)
3. **APPEAL—DIRECTED VERDICT—PRESUMPTIONS—APPURTENANCES TO STOREROOM.**—On this appeal from a judgment on a directed verdict, the appellate court, not having the complete evidence before it, was bound to indulge in every intendment in favor of the regularity of the court's procedure, and, therefore, was bound to assume that the basement under the leased storeroom in question, including the space under the sidewalk, was reasonably necessary to the enjoyment of such storeroom and passed with the lease thereof as a necessary incident or appurtenance. (*Id.*)
4. **LANDLORD AND TENANT—COVENANT TO REPAIR.**—Where the lease to a storeroom carries with it, as a necessary incident or appurtenance, the basement thereunder, it also includes the iron grating that permits the entrance of light and air to such basement, and the tenant's covenant to keep the leased premises in repair applies to it. (*Id.*)
5. **LANDLORD AND TENANT—FAILURE TO REPAIR—LIABILITY FOR INJURIES.**—When premises are in good repair at the time they are let, and the landlord, under the terms of the lease, is not bound to keep them in repair, the tenant in possession, and not the landlord, is liable for an injury resulting from a failure to repair the pavement in front of the premises. (*Id.*)
6. **COVENANT TO REPAIR—ORDINARY CARE.**—If, as originally constructed, the iron grating or other similar device in the sidewalk is safe and not a nuisance *per se*, and, at the date of the execution of the lease of the part of the premises to which it is solely appurtenant, it is safe and not, in its nature and character, a nuisance, the owner exercises ordinary care to keep it in such condition if he exacts from his lessee a covenant to make all necessary repairs. (*Id.*)

LEASES (Continued).

7. **INJURY TO INVITEE—LIABILITY OF LANDLORD.**—One who, upon the express or implied invitation of the tenant, enters or is proceeding to enter upon the leased premises, is an invitee, and as such stands in the shoes of the tenant, and may not recover if the tenant cannot; and the tenant may not recover if the burden of repairing rests upon him. (Id.)
8. **VOLUNTARY REPAIRS BY LANDLORD—ADMISSION OF LIABILITY.**—Voluntary repair by a landlord of a defect in the demised premises after an injury resulting therefrom is not an admission of liability, and, therefore, in an action to recover for such injury, evidence of such a repair by the landlord is not admissible. (Id.)
9. **LANDLORD AND TENANT—REBATE IN RENT—EFFECT ON LEASE.**—A rebate, for certain months, made by the lessor to the lessee and to a committee of its creditors, is not sufficient to establish a change in the written lease so as to affect the amount of future installments of rent. (*James Eva Estate v. Oakland B. & M. Co.*, 515.)
10. **CORPORATION PARTY TO REBATE—ESTOPPEL.**—Where the corporation surety for the lessee, through its vice-president, asked for and consented to such change in the amount of the rent, it cannot be heard to object thereto. (Id.)
11. **LANDLORD AND TENANT—BOND GUARANTEEING PAYMENT OF RENT—TIME FOR GIVING—EXTENSION BY LESSOR.**—A provision in a lease requiring a bond guaranteeing payment of the rent thereunder to be executed on or before a given date is clearly for the benefit of the lessor; therefore, the time for the giving of such bond may be extended by the lessor. (*Bakersfield Co. v. Bakersfield etc. Co.*, 703.)
12. **OPTION OF LESSOR TO REQUIRE BOND—TIME WITHIN WHICH TO BE EXERCISED—EXTENSION—WAIVER.**—Where the lease does not provide at what date the option of the lessor to make the giving of the bond a condition precedent to the taking effect of the lease must be exercised, it will be presumed that it is to be exercised within a reasonable time. The lessor might be indulgent with the lessee in the matter of extending his time without waiving the option secured to it under the lease. (Id.)
13. **TIME OF TAKING EFFECT OF LEASE—EFFECT OF CONDITIONS PRECEDENT.**—Provisions in a lease that the execution of a bond guaranteeing the payment of the rent and that the expenditure of a certain sum of money by the lessee upon the premises for lights, display signs, etc., shall at the option of the lessor be conditions precedent to the lease taking effect, indicate that the parties do not intend the lease to take effect at the time it is signed. A condition precedent is one which must be performed in order to have any rights vest. (Id.)

LEASES (Continued).

14. **AGREEMENT TO EXECUTE BOND—EFFECT OF SUBSEQUENT PROVISION.**—Where a lease provides that the lessee will execute and deliver to the lessor on or before a given date a good and sufficient undertaking, in a specified sum, conditioned for the payment of the rent therein reserved, a subsequent provision that “the executing and delivery of said bond” shall at the option of the lessor “be a condition precedent to this lease taking effect” will neither limit nor enlarge the rights of the lessor or the lessee. (Id.)
15. **SUBSEQUENT EXECUTION OF BOND—EFFECT—CONSIDERATION.**—In such case, where a bond, though executed subsequent to the time originally contemplated, is the one originally provided for, it relates back to and takes effect in pursuance of the original agreement and is supported by the original consideration. (Id.)

See Contracts, 15, 17, 20; Landlord and Tenant, 2, 3.

LIENS. See Deeds, 1; Judgments, 1; Mechanics' Liens; Street Law, 16.

LIFE INSURANCE.

1. **MISNOMER OF INSURED—ACTION ON POLICY—EVIDENCE.**—In an action on a life insurance policy issued by a fraternal organization and assumed by the defendant, there is no error in admitting in evidence over objection of the defendant the original certificate of insurance which purported to run to “George E. Prull” instead of “George E. Trull,” where the defendant had received payments from Trull, and in its answer set up its assumption of the particular certificate, referring to it by number. (Trull v. Independent Order of Puritans, 479.)
2. **ANSWER—WRITING NOT DENIED—ADMISSION.**—In such action, where the application for the assumption of the insurance contract by the defendant was set forth in full in its answer, and was not denied under oath within ten days, it was admitted for all purposes of the case. (Id.)
3. **MISREPRESENTATIONS—BURDEN OF PROOF.**—In such action, the burden of proving misrepresentations was on the defendant, and where the only witness it produced was the physician who examined the insured, and he testified that at the time of the application for assumption of the policy he had no reason to believe that the insured was otherwise than in good health, it not only failed to make out its defense, but supported the plaintiff's case. (Id.)
4. **SUFFICIENCY OF COMPLAINT.**—In this action on a life insurance policy, the complaint was not defective in failing to set forth in full the original application for insurance. (Id.)

MAINTENANCE. See Injunction, 1; Judgments, 1.

MALICIOUS PROSECUTION.

1. **DEFENSE—ADVICE OF COUNSEL—ERRONEOUS EXCLUSION OF EVIDENCE.**—In an action for malicious prosecution, the court erred in not permitting the defendant to prove that material facts were communicated to his counsel despite the fact that some of the facts and circumstances may have been communicated a month or two earlier than the date on which the arrest was advised. (*Montz v. Nevins*, 202.)
2. **PROBABLE CAUSE—MIXED QUESTION OF LAW AND FACT.**—Probable cause is to be determined by the court when the facts are uncontroverted; but when the evidence is conflicting as to any of the facts, the existence of the facts in dispute is to be found by the jury, and the question whether the facts found by the jury establish probable cause is to be decided by the court. (*Id.*)
3. In an action for malicious prosecution, the defense of advice of counsel goes to the question of probable cause and must be considered in determining that matter. (*Id.*)

MANDAMUS.

EXECUTION.—Where the sheriff's return to an alternative writ of mandate requiring him to show cause why he should not execute a writ of execution issued out of a superior court is based upon a restraining order issued out of a superior court enjoining him from so doing, and the appellate court, having jurisdiction, has already decided that the last-mentioned superior court had no jurisdiction to make any order in said matter other than one dissolving said restraining order, it follows that the peremptory writ of mandate must issue. (*Kelsey v. Byers*, 228.)

MECHANICS' LIENS.

1. **TIME FOR FILING CLAIM—WHEN BEGINS TO RUN—NOTICE OF COMPLETION.**—The time for filing a claim of mechanic's lien begins to run not from the date of completion, but from the date of the owner's filing of notice of completion of the contract, and it is in time if filed within thirty days thereafter. (*Consolidated Lbr. Co. v. Bosworth, Inc.*, 80.)
2. **FINDING SUFFICIENTLY DEFINITE—"ON OR ABOUT."**—A finding that notice was filed "on or about" a stated time, if indefinite, is not reversible error under section 4½ of article VI of the constitution where there was, in fact, a leeway of several days in which notice might have been filed, and the evidence showed that notice was filed in time. (*Id.*)
3. **FINDINGS—CONTRACT FOR LUMBER—PRICE IN ACCORDANCE WITH CLAIM OF LIEN.**—Evidence examined and found to sustain the finding of the court that the contract for lumber was for the reasonable market value and not a fixed price. (*Id.*)

MECHANICS' LIENS (Continued).

4. **CONCRETE "FORMS"—MATERIAL USED FOR—RIGHT TO LIEN.**—Where the nature of concrete work contracted for is such as to require the use of forms to hold it in place while it hardens into a self-sustaining permanent structure, and the materials from which the forms are made are consumed in the process, such materials come within the definition of "materials to be used or consumed" in the construction of a building as contained in section 1183 of the Code of Civil Procedure. (Id.)
5. **MEASURE OF LIABILITY FOR MATERIALS USED IN FORMS—DEPRECIATION IN VALUE OF LUMBER CONSUMED.**—The percentage of the depreciation in value of lumber consumed by using it for the making of concrete forms, if justified by evidence, is a proper mode of determining the amount for which a lien may be had for materials so used. (Id.)
6. **FORECLOSURE—PROOF—CIRCUMSTANTIAL EVIDENCE.**—In an action for the foreclosure of a lien for materials used in the construction of buildings, if there is sufficient evidence as to the circumstances and negotiations of the contract and delivery of the material to give rise to a legal inference that the parties arrived at an understanding that the material was sold to be used in the erection and construction of the buildings in question, then under sections 1832, 1859, and 1960 of the Code of Civil Procedure, the court can so find, and base its finding thereon without a word of direct testimony as to such agreement or understanding. (Id.)
7. **SEVERAL CONTRACTS FOR BUILDINGS ON SAME PROPERTY—VARIANCE.**—Where in a foreclosure under the mechanic's lien law of 1911 the liability of the owner is not limited owing to the failure to file a bond, and the evidence shows three contracts for buildings or parts of buildings on the same property as part of a single enterprise, it can make no difference to the owner whether the liens chargeable against the property arise under one or other of the contracts, and an allegation in the complaint of one contract is not at fatal variance with the proof. (Id.)
8. **CARTAGE.**—Claims for cartage of materials are properly included in a lien claim as part of the price of materials furnished. (Id.)
9. **APPEAL—FAILURE TO FIND ON ESSENTIAL ISSUE—CONCRETE FORMS—NECESSITY FOR RETRIAL.**—In this suit for the foreclosure of a mechanic's lien, where the court found that all but ten per cent of the value of the lumber used in concrete forms was consumed in such use, but did not determine the amount or value of the material so used, and neither the value nor the quantity is shown in evidence, the cause must be remanded for trial on that issue. (Id.)
10. **TIME FOR FILING CLAIM—CONSTRUCTION OF SECTION 1187, CODE OF CIVIL PROCEDURE.**—Under section 1187 of the Code of Civil Pro-

MECHANICS' LIENS (Continued).

cedure, where work is done under contract between the owner of the property upon which an improvement is made and the contractor, persons furnishing either labor or material may, at their option file their claims of lien, either within thirty days after ceasing to labor or to furnish materials, or within thirty days after the completion of the original contract between owner and contractor; but where the work is not done under such a contract, laborers and materialmen must file their liens within thirty days after they have ceased to labor or to furnish materials. (*Irwin v. Silva*, 135.)

11. **IMPROVEMENTS MADE BY OWNER HIMSELF—ESTOPPEL NOT APPLICABLE.**—Where the improvements are not made under contract, but by the owner himself, either actually or constructively, the provisions of section 1187 of the Code of Civil Procedure, as to the filing of notice of completion, do not apply, and the estoppel raised by the latter part of that section, where there is a default on the part of the owner to file such notice, cannot be invoked by a laborer or a materialman. (*Id.*)
12. **ENUMERATION OF CLASSES OF PERSONS—PURPOSE.**—The enumeration of various classes of persons in section 1183 of the Code of Civil Procedure is in no sense a classification of them for the purpose of providing a lien for each class, but is simply an attempted enumeration of those callings whose members furnish the requisite labor in the construction of buildings, and the lien is the same in the case of all persons entitled, and is given to them not as followers of a particular trade or calling, but as persons having furnished labor contributing to the erection of the building. (*Ogram v. Welchhoff*, 298.)
13. **CONSTRUCTION OF CODE SECTIONS.**—The sections of the code embracing the mechanic's lien law, being remedial in character, should be liberally construed. (*Id.*)
14. **NO WORK "AGREED TO BE DONE"—STATEMENT OF CLAIM.**—Where an artisan, such as a carpenter, is employed at daily wages to work at his trade under the direction of his employer and no specific work is agreed to be done, the requirement of section 1187 of the Code of Civil Procedure that the "work agreed to be done" should be stated in the claim of lien, has no application. (*Id.*)
15. **COMPLETION OF CONTRACTS — FINDING — EVIDENCE.**—Where a sublessee, proposing changes in the leased premises, employs certain persons to perform the plumbing, electrical wiring and painting, and no definite price is agreed upon nor plan adopted for the contemplated changes, but the work is laid out from day to day as it progresses, and such persons employed to do the work follow the instructions given to them from time to time by the sublessee, or his superintending contractor, as to the manner of its performance, in an action to foreclose their liens for such

MECHANICS' LIENS (Continued).

work, testimony of the plaintiffs that all the work which the sublessee had requested had been performed prior to his death, is sufficient to sustain a finding that the contracts of the plaintiffs were completed on the date of such death. (*Perazzi v. Doe Estate Co.*, 617.)

16. **SUBSEQUENT PERFORMANCE OF WORK.**—Evidence that the employees of such plaintiffs were working on the premises at the time of the death of the sublessee, and that all the changes contemplated had not then been made, but were completed at a later date, is not, under the circumstances, necessarily inconsistent with the finding that the contracts of the plaintiffs were completed on the date of such death. (*Id.*)
17. **UNSUPPORTED FINDING.**—A finding that certain work was completed on a given date is unsupported by the evidence where the only evidence offered is the testimony of one of the claimants that the work was finished on a date twenty-five days earlier. (*Id.*)
18. **NOTICE OF COMPLETION—FAILURE TO FILE—PLEADING AND PROOF.**—Where notice of claim of lien is not filed within sixty days after the completion of their contract, the burden of alleging and proving the failure of the owner to file the notice of completion under the provisions of section 1187 of the Code of Civil Procedure, is upon the plaintiff. (*Id.*)
19. **ALTERATIONS BY LESSEE—KNOWLEDGE BY OWNERS—NONLIABILITY NOTICE.**—Knowledge by the owners of given premises that certain alterations and repairs are to be made by their lessee is sufficient to require such owners to file the notice prescribed by section 1192 of the Code of Civil Procedure as a condition of relieving their property from liability for the cost of the work performed at the request of the lessee, though such owners have no knowledge as to the scope of said work. (*Id.*)
20. **NOTICE OF COMPLETION—DELAYED FILING OF CLAIM—DEFENSE—ESTOPPEL—PLEADING—PROOF.**—Where, in an action to foreclose a mechanic's lien, notice of claim of which was filed more than sixty but less than ninety days after the completion of the work, the plaintiff relies upon the failure of the defendant to file the notice of completion provided for in section 1187 of the Code of Civil Procedure, he must plead and prove the facts constituting such estoppel. (*Greely v. Noble*, 628.)
21. **ABANDONMENT OF CONTRACT—VALUE OF WORK PERFORMED—SUFFICIENCY OF FINDINGS.**—In an action to foreclose contractors' and materialmen's liens, under section 1200 of the Code of Civil Procedure, prior to its repeal in 1911, a finding, "that the value of the work and materials already done and furnished at the time of the abandonment of said work and contract" by the contractor, "including materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole

MECHANICS' LIENS (Continued).

contract price, exclusive of the extra work," was a certain aggregate sum, being a given per cent of the contract price, "on account of which there had been paid the contractor" at the time of the abandonment a stated sum, followed by a finding as to the reasonable value of the extra work performed under authorization from the owners, the amount paid on account thereof, and the balance due therefor, was a sufficient finding of fact. (*Pacific Mfg. Co. v. Perry*, 708.)

22. **RIGHT TO ABANDON CONTRACT—PAYMENT OF LIENS—PROPORTION OF CONTRACT PRICE APPLICABLE.**—Section 1200 of the Code of Civil Procedure, as it existed prior to its repeal, recognized that a building contract might be terminated by abandonment, and provided a method of arriving at the proportion of the contract price applicable to liens in that event. Under it, upon abandonment, the performance of the contract came to an end, and the rights of all parties thereunder were to be adjusted as of that date. (*Id.*)
23. **AMOUNT APPLICABLE TO PAYMENT OF LIENS — PROPER FINDING.**—In such action the court, having found that at the time of the abandonment the contract had been a given per cent completed, properly held that that per cent of the contract price, less payments made, was applicable to the discharge of liens which had accrued prior to the abandonment. The *actual* cost of completing the building was immaterial. (*Id.*)
24. **ACTION TO FORECLOSE LIEN—JUDGMENT-ROLL IN ANOTHER ACTION NOT ADMISSIBLE.**—In such action the court properly sustained an objection to the admission in evidence of the judgment-roll in another action by the same plaintiff against the defendant contractor, wherein the plaintiff had recovered a judgment, which on execution issued thereon was satisfied, where there was an entire absence of evidence connecting the subject matter of the former action with that in the suit before the court. (*Id.*)

MINING LAW.

NOTICE OF LOCATION—SUFFICIENCY OF DESCRIPTION.—In this action to quiet title to a copper mining claim, the trial court was justified in concluding that there was an honest attempt by defendants, who claimed under a prior notice of location, to locate said land, that there was a sufficient compliance with the requirements of the law, and that plaintiff had full knowledge of the extent of defendants' claim. (*Sydney v. Richards*, 685.)

MISCONDUCT. See Criminal Law, 18.

MISREPRESENTATIONS. See Life Insurance, 3.

MISTAKE. See Account Stated, 1, 5.

MONEY HAD AND RECEIVED. See Judgments, 2.

MONOPOLIES. See Contracts, 1.

MORTGAGES.

1. **SHARES OF STOCK.**—Where the purchaser of land gave in payment shares of stock and a note, secured by a mortgage on the land with a proviso in the note for its cancellation if the payee received dividends from the shares equal to the amount of the note, such stock did not constitute additional security for the payment of the sum. (*Fratessa v. Roffy*, 179.)
2. **FORECLOSURE—PARTIES.**—A mortgagor who has disposed of his entire interest is an unnecessary party to the foreclosure of a mortgage. (*Id.*)
3. **PLEADING.**—In a foreclosure action a defense that the land has been exonerated from liability must be specially pleaded. (*Id.*)
4. **FORECLOSURE—APPEAL.**—In an action to foreclose a mortgage which was given by the mortgagors to secure a fixed sum and also further advances, and the fulfillment of any covenants or agreements which the mortgagors might agree in writing with the mortgagees should be secured thereby, the finding of the court that the mortgagors had agreed that a certain further advance should be secured by the mortgage will not be disturbed by the appellate court where the evidence is conflicting. (*Palo Alto Mut. etc. Assn. v. Mullen*, 197.)
5. **INSTRUCTION.**—The construction of the clause in question is that the necessity of an agreement in writing under said clause is limited to the fulfillment of "any covenants or agreements," and does not apply to the further advances designated in the same clause. (*Id.*)
6. **COMMUNITY PROPERTY—SECURITY FOR HUSBAND'S DEBT—SUBSEQUENT CONVEYANCE TO WIFE—NEW MORTGAGE—CONSIDERATION.**—Where a husband mortgaged community property as security for his individual indebtedness, and thereafter conveyed the property to his wife, and after his debt had been extended from time to time and he had made several payments by which the debt had been reduced, the wife joined him in the execution of a new mortgage on the property to secure his promissory note for the amount then remaining unpaid, the original indebtedness and the various extensions of time granted the husband in which to pay the same furnished a valuable consideration to him for the note and mortgage. (*Smith v. Hernan*, 217.)
7. **WIFE'S LIABILITY—SURETYSHIP.**—The debt in such case not being that of the wife, and the property being her separate property, she stands as surety for the payment of the debt. (*Id.*)

MORTGAGES (Continued).

8. **FORECLOSURE—EXPENSE OF SEARCH OF TITLE.**—On the foreclosure of such mortgage, there being no provision in the instrument securing the expense of a search of title prior to foreclosure proceedings, the allowance in the judgment of twenty-five dollars for such expense was erroneous, and the judgment should be modified accordingly. (Id.)
9. **SIGNATURE OF WIFE—RELATING TO OBLIGATION.**—Where the wife signs a mortgage given as security for the payment of a community debt, she is not merely a surety, but one of the principal obligors to the mortgage. (Good v. Brown, 753.)
10. **HYPOTHECATION OF COMMUNITY INTEREST—CONSIDERATION.**—A promise by the mortgagee "to put up barley and groceries and summer-fallow the land," and to bring no action until after harvest, constitutes sufficient consideration to support the hypothecation by the wife of her interest in the community real estate. (Id.)
11. **EXISTENCE OF PRIOR MORTGAGE—EFFECT ON FORECLOSURE OF SUBSEQUENT MORTGAGE.**—The foreclosure of a mortgage will not be barred by the existence of another prior mortgage which is security for the same debt, even though the prior one is a chattel mortgage. (Id.)
12. **FORECLOSURE—MARSHALING OF ASSETS—PRESERVATION OF HOMESTEAD.**—Where a creditor holds two mortgages as security for the same indebtedness, one of which covers real property on which a declaration of homestead has been duly executed and recorded, the humane policy of the law requires that such homestead, if possible, be preserved for the use and home of the family, and that the creditor first exhaust the other security in satisfaction of the indebtedness. (Id.)
13. **EFFECT OF SECURITY BEING INCLUDED IN TWO MORTGAGES—RIGHTS WHERE BOTH COVER COMMUNITY PROPERTY.**—It can make no difference in the application of the principle requiring the creditor to first exhaust other than the homestead property given as security that the security is included in two mortgages instead of one, or that one covers personal property instead of real estate; nor is the question affected in the least by the fact that both mortgages cover community property. (Id.)

MOTIVE. See Criminal Law, 15.

MOTOR VEHICLE ACT. See Title.

MUNICIPAL CORPORATIONS.

1. **CARE OF BRIDGES AND STREETS—NEGLIGENCE OF OFFICERS—NON-LIABILITY.**—In the absence of a statutory provision declaring otherwise, a municipal corporation in California is not liable in

MUNICIPAL CORPORATIONS (Continued).

damages for the neglect of its officers or agents in the maintenance or care of streets or bridges. (South v. County of San Benito, 13.)

2. **COUNTIES—JOINT BRIDGE—FAILURE TO MAINTAIN—NONLIABILITY FOR ACCIDENT.**—Neither a county nor its board of supervisors is liable for personal injuries received by one who, while riding in an automobile, was precipitated into the bed of a creek, the center line of which was the dividing line between this county and another, the accident having occurred in the latter county and the embankment over which the automobile was precipitated being in that county, and the accident having been caused by the failure to maintain a bridge over the creek as had formerly been done, there being no showing of a joint duty imposed by law upon the boards of supervisors of the two counties to construct the bridge, in the absence of an allegation in the complaint that they had come to an agreement as to the proportion of cost to be borne by each county and that funds were available for the construction of the bridge. (Id.)
3. **PARKS AND PLAYGROUNDS—ACQUIRING OF LANDS—SALE OF PROPERTY FOR DELINQUENT ASSESSMENTS.**—Under the act of the legislature approved April, 1909 (Stats. 1909, p. 1066), authorizing the acquiring of land by municipalities for purposes of public parks or public playgrounds, the establishment of assessment districts and the assessment of the property therein to pay the expense of acquiring such land, it is the fact of the delinquency of a given assessment, rather than the attachment of a certificate as to that fact, which establishes the jurisdiction of the board of public works to proceed with the sale of the property. (O'Neil v. Brode, 371.)
4. **CERTIFICATE OF SALE—EXECUTION—FACSIMILE STAMP SIGNATURE.**—The requirement of such act that, after making sale of property for delinquent assessment, the street superintendent must execute in duplicate a certificate of sale, one copy of which is to be filed in the superintendent's office and the other delivered to the purchaser, is sufficiently complied with by the signing of one certificate by the president of the board of public works (such board acting in the stead of the street superintendent), which is delivered to the purchaser, and the signing of the other by a *facsimile* stamp signature of the same officer, which is impressed by the assessment clerk at the direction of such officer. (Id.)
5. **EXECUTION OF DEED BY PRESIDENT OF BOARD.**—The board of public works has power to direct its president to make all deeds of property sold for delinquent assessments, as the act to be done is one which involves no discretion on the part of the board. (Id.)

MUNICIPAL CORPORATIONS (Continued).

6. **AUTHORITY OF PRESIDENT—DATE OF RESOLUTION IMMATERIAL.**—The fact that the resolution of the board of public works directing the president thereof to execute such deeds was adopted before the passage of the act under which the assessment was levied and sale had does not affect his authority to execute such deed. (Id.)
7. **NOTICE TO REDEEM—RECITAL OF UNAUTHORIZED ITEM—EFFECT.**—Where the notice to redeem, as given by the purchaser, sufficiently refers to the improvement for which the property was sold and states the amount required to be paid to effect redemption, the fact that it also contains a statement that there will be added "\$3.00 for the service of this notice and making affidavit thereto, as allowed by law," even though such charge is unauthorized, does not invalidate the notice. (Id.)
8. **SERVICE OF NOTICE—SUFFICIENCY OF AFFIDAVIT.**—The affidavit of service of the notice to redeem is not faulty in failing to state the name of the person upon whom service was made, it stating that on a given date the purchaser did "serve upon the owner and occupant of said property a notice," etc. (Id.)
9. **ANNEXATION PROCEEDINGS—ORGANIZATION OF CITY—OVERLAPPING OF TERRITORY—JURISDICTION OF SUPERVISORS.**—After a valid petition for annexation, pursuant to the Annexation Act of 1913, is received and acted upon by the commission of the city to which the territory is proposed to be annexed and an annexation election is called, the board of supervisors of the county have no jurisdiction to entertain and act upon a petition calling for proceedings to organize a city including a part of the same territory while the annexation proceedings are pending. (People v. City of Monterey Park, 715.)
10. **CONSTRUCTION OF SECTION 7 OF ANNEXATION ACT—SCOPE OF ACT.**—Section 7 of the Annexation Act of 1913, as amended in 1915, is merely declaratory of existing law, and was intended to declare and place beyond doubt the disability of one city to annex territory during the pendency of proceedings by another city to annex the same territory, and was not enacted as a limitation of the jurisdiction of the municipality first acting in the matter. The creation of a new and separate municipal corporation through the action of the county authorities and including the territory proposed to be annexed is not a part of the subject matter of the Annexation Act. (Id.)
11. **CASE AT BAR—IMPROPER CLASSIFICATION OF TERRITORY.**—In this action the petition for annexation showed that the proceedings were on their face an attempt by the flimsiest subterfuge to treat as inhabited various uninhabited tracts of land, and to annex them

MUNICIPAL CORPORATIONS (Continued).

under the proceedings prescribed by a statute which applies solely to annexation of inhabited territory. (Id.)

12. **STATUS OF TERRITORY—DECISION OF COMMISSION NOT FINAL.**—Assuming that the question whether or not all the territory included in an annexation petition is inhabited is regularly submitted to and decided by the commission of the city to which such territory is sought to be annexed, such decision is not final where the annexation petition "on its face" is not sufficient. (Id.)
13. **ANNEXATION PROCEEDINGS INVALID—JURISDICTION OF SUPERVISORS TO ENTERTAIN INCORPORATION PROCEEDINGS.**—Where, as in this case, there is in fact no valid pending annexation proceeding in existence at the time affecting any of the territory included in the proceedings for the incorporation of the new city, the board of supervisors is authorized to receive and act upon a petition for such incorporation. (Id.)

See Waters and Water Rights, 8.

NEGLIGENCE.

1. **ACTION FOR PERSONAL INJURIES—AUTOMOBILE ACCIDENT—PLUNGING DOWN EMBANKMENT—PLEADING—INSUFFICIENT COMPLAINT AGAINST DRIVER.**—In an action by the guest of an automobile driver for damages for personal injuries sustained when the automobile plunged over an embankment into the bed of a bridgeless creek, the complaint failed to state a cause of action where the only allegation of negligence was that the defendant "negligently failed to observe that the said road terminated at said creek in such drop or declivity," while it was also alleged that no lights were displayed nor any warnings of any kind given of the fact that the declivity existed, or that the defendant had any independent knowledge, and it was therefore apparent the defendant could not be negligent in failing to observe something it was impossible for him to observe. (South v. French, 28.)
2. **AUTOMOBILE COLLISION—ACTION FOR PERSONAL INJURIES—VERDICT FOR PLAINTIFFS SUSTAINED BY EVIDENCE.**—In this action by husband and wife against two defendants for personal injuries sustained by the wife in an automobile collision, the evidence from the typewritten transcript, so far as printed in the briefs, is found sufficient to support the verdict of the jury in favor of the plaintiffs against both defendants. (Hammond v. Hazard, 45.)
3. **IMPLIED FINDINGS—OWNERSHIP OF CAR AND AGENCY OF DRIVER.**—In such case the evidence was also sufficient to sustain the implied finding that the female defendant who occupied the car with the driver was the owner of the car, and the driver was her agent. (Id.)

NEGLIGENCE (Continued).

4. EVIDENCE OF OWNERSHIP—CONDUCT—ADMISSIONS.—The conduct of the female defendant in busying herself with the names of witnesses and making statements referring to the car as "my car" etc., and stating that she would "settle all damages," together with the fact, admitted on the trial, that the car was registered under her name, was amply sufficient to justify the jury in disbelieving the direct evidence of both defendants that she was not the owner of the car. (Id.)
5. AUTOMOBILE ACCIDENT—PERSONAL INJURIES—OWNERSHIP OF CAR—EVIDENCE—OBJECTION PROPERLY OVERRULED.—In this action for damages for injuries sustained in an automobile collision there was no error in overruling an objection to a question to a witness, who, being asked if at the time of the collision he heard the female defendant make any statement with reference to the accident, answered that she said: "My car is hurt just as much as the other car," since it was for the jury to say on a consideration of all the evidence whether in using the words "my car" she referred to the matter of ownership, or was simply making a comparison of the damage to the respective cars. (Id.)
6. STREET RAILWAY—PEDESTRIAN—ROPE DANGLING FROM TROLLEY.—The act of a street railway company in operating a trolley-car upon and across a crowded thoroughfare with the trolley-rope at its rear swinging in a loop which rendered it liable to strike and catch and cast down pedestrians passing behind such car was in and of itself a negligent act. (*Sallee v. United Railroads*, 51.)
7. MOTION FOR NONSUIT—KNOWLEDGE OF DEFENDANT—*RES IPSA LOQUITUR*.—Assuming that against a motion for nonsuit the plaintiff was required to furnish as a link in the chain of proofs sufficient to make out a *prima facie* case proof that the defendant knew that the rope was dangling or that the officials of the defendant knew it, she was entitled to rely on the doctrine of *res ipsa loquitur* to supply that link. (Id.)
8. APPLICABILITY OF DOCTRINE.—The doctrine of *res ipsa loquitur* is applicable to cases of collisions between street-cars and pedestrians. (Id.)
9. EVIDENCE OF NEGLIGENCE.—In this action there was sufficient evidence of negligence; the appliance was shown to be under the management of the defendant or its servants; the accident was such as in the ordinary course of things could not happen where those in the immediate charge and control of the appliance use proper care; and these facts afford sufficient evidence, in the absence of explanation by the defendant, that the accident occurred through the want of proper care on the part of the defendant or its employees. (Id.)

NEGLIGENCE (Continued).

10. **PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.**—In this action there was sufficient evidence that the striking of the plaintiff by the swinging loop of the trolley rope was the proximate cause of her injuries, and to have entitled the case to be passed upon by the jury, while there was no such evidence of contributory negligence upon the plaintiff's part to have warranted the court in withholding the case from the jury on that ground as matter of law (Id.)
11. **AUTOMOBILE ACCIDENT — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE—PLEADING.**—In an action for damages for personal injuries sustained by the plaintiff being struck by defendant's automobile, an answer denying that the plaintiff was struck by said automobile from any other cause than his own negligence, and alleging that, on the contrary, the collision with the plaintiff and any injuries which the plaintiff sustained therefrom were wholly and solely due to the negligence of the plaintiff, was insufficient to raise an issue of contributory negligence. (*Off v. Crump*, 173.)
12. **FINDINGS SUPPORTED BY EVIDENCE.**—In this action for personal injuries from a collision with defendant's automobile, the findings of the court, both as to the negligence of the defendant and as to freedom from contributory negligence on the part of the plaintiff are supported by the evidence. (Id.)
13. **ELEVATOR ACCIDENT—ACTION FOR DEATH OF PASSENGER.**—In this action for damages for death alleged to have been caused by the negligent operation of an elevator, the record showed no abuse by the court of its discretion in granting a new trial after verdict for the plaintiff. (*Ramsay v. McCreery Estate Co.*, 190.)
14. **ACTION FOR PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — DIMINISHED DAMAGES.**—Where, in an action by an employee against the employer for damages for personal injuries received while the Roseberry Act was in force, the court instructed the jury that the fact that such employee might have been guilty of contributory negligence would not preclude a recovery if such negligence was slight, while that of the employer was gross in comparison, but that the damages might be diminished by the jury in proportion to the amount of negligence attributable to such employee, the appellate court must assume in support of the judgment that if the evidence in any particular did show negligence on the part of the employee, the jury made the proper deduction therefor in arriving at its verdict. (*Olcese v. Hardy*, 323.)
15. **ACTION FOR PERSONAL INJURIES — PLEADING — PROOF.**—Where, in such an action, the general allegations of negligence are followed by an enumeration of specific acts, the plaintiff will not be limited to proof of specific acts unless the complaint clearly indicates the intention of the pleader to limit the negligence to such acts. (Id.)

NEGLIGENCE (Continued).

16. **EXCAVATION IN PUBLIC STREET—DUTY TO PUBLIC.**—A person making an excavation in a public street is under the duty to take such precautions with respect to the excavation made as to avoid danger to users of the street; and in an action for personal injuries sustained by plaintiff by falling into such an excavation, evidence that the defendant failed to maintain a substantial barrier around that part of the excavation into which the plaintiff fell, established negligence on the part of the defendant. (*Fernald v. Eaton & Smith*, 498.)
17. **FAILURE TO MAINTAIN BARRIER—PROXIMATE CAUSE OF INJURY.**—In this action for personal injuries, the negligence of the defendant in failing to maintain a substantial barrier around that part of the excavation into which the plaintiff fell was the proximate cause of the injury. (*Id.*)
18. **CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF MINOR—INSTRUCTIONS.**—In this action for personal injuries sustained by a minor in falling into an excavation made by the defendant in a public street, the instructions given by the court fully advised the jury as to the degree of care required of a child of tender years and that whether the plaintiff himself was guilty of negligence was for them to determine from all the evidence in the case, taking into consideration his age and capacity. (*Id.*)
19. **MEASURE OF DAMAGES.**—The law prescribes no definite measure of damages in such a case, but leaves the amount of damages to the sound discretion of the jury, taking into consideration all the circumstances attending the occurrence of the injury. (*Id.*)
20. **ACTION FOR PERSONAL INJURIES—FALL OF FAN IN THEATER—RES IPSA LOQUITUR—INSTRUCTIONS.**—Where a fan which was installed in a theater, and which was exclusively within the charge and control of the owner thereof, pulled or dropped away from its motor bearings and fell and injured one of the patrons, the accident was such as to make applicable, in an action against such owner for the injuries thus caused, instructions as to a presumption of negligence under the rule of *res ipsa loquitur*. (*Haun v. Tally*, 585.)
21. **IMPROPER RELEASE OF EMPLOYEE.**—The fact that the employee who installed the fan was improperly exculpated in such action is not a matter of which the owner, who was held liable, is in a position on appeal to complain. (*Id.*)
22. **SPECIAL DAMAGES—PROOF—INSTRUCTIONS.**—In such action the court properly instructed the jury that the expenses incurred by the plaintiff for services of physicians and the value of time lost were "subjects of direct proof, and are to be determined only on the evidence which the jury has before it," while the other ele-

NEGLIGENCE (Continued).

ments of damage were from necessity left to the sound discretion of the jury. (Id.)

23. **PROOF OF NEGLIGENCE—INSTRUCTIONS.**—In such action, where the general charge of the court as given advised the jury that the burden was upon the plaintiff to sustain the allegations made, there was no error of a substantial nature in refusing to give a particular instruction offered by the defendant which narrated the several things contained in the charging part of the complaint as constituting negligence and advised the jury that plaintiff was required to make proof thereof. (Id.)
24. **ACTION FOR DAMAGES FOR PERSONAL INJURIES—BREAKING OF ROPE—WANT OF SATISFACTORY EXPLANATION—INFERENCE—FINDING.**—In an action for damages for personal injuries suffered by plaintiff through the breaking of a rope which was being used by defendant's employees, including plaintiff, in putting back and placing a dump-car upon the track off which it had rolled, if the evidence produced by the plaintiff showing his injury by reason of the breaking of the rope is such as to raise an inference of negligence, in the absence of a satisfactory explanation of the circumstances on the part of the defendant, it cannot reasonably complain against the finding of such negligence. (*Duran v. Yellow Aster Min. etc. Co.*, 638.)
25. **CAUSE OF INJURY—CONTROL OF DEFENDANT—EVIDENCE OF WANT OF CARE.**—When a thing which causes injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. (Id.)
26. **SPONTANEOUS EXCLAMATIONS—ADMISSIBILITY AS EVIDENCE.**—In an action for damages for personal injuries, evidence of a spontaneous declaration uttered by the plaintiff at the time of the injury is admissible. (Id.)
27. **MEASURE OF DAMAGES—INSTRUCTIONS.**—In an action for damages for personal injuries, it is not error to instruct the jury that "if from the evidence in this case, the jury should find that the plaintiff has sustained damages as alleged in his complaint, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have testified or expressed an opinion as to the amount of such damages, but the jury may make such estimate from the evidence in the case and by considering them in connection with their own knowledge and experience in the affairs of life," where in other instructions the jury is plainly told that if they find for the plaintiff they should award to him only such

NEGLIGENCE (Continued).

actual damages as the evidence showed that he had sustained . . . ,” taking into consideration his loss of earnings (if any), necessary expenses in medical and surgical aid, so far as the same appear in evidence in this case (if any).” (Id.)

28. AMOUNT OF DAMAGES AWARDED—EVIDENCE.—In this action for damages for personal injuries, in view of the fact that the plaintiff was compelled to undergo much suffering and there was evidence tending to show permanent disability affecting two fingers of his right hand, and other disabilities still continuing at the time of the trial, which was nearly two years after the date of the accident, there was no such discrepancy between the evidence and the amount of the damages awarded as to raise an inference that the verdict must have been influenced by passion or prejudice on the part of the jury. (Id.)

29. ACTION FOR PERSONAL INJURIES — EXTENT OF INJURIES — FINDINGS—EVIDENCE.—In this action to recover damages for personal injuries sustained by plaintiff as a result of his collision while riding a bicycle, with an automobile driven by the defendant, the findings of the trial court with respect to the extent of the plaintiff's injuries were justified by the evidence. (*Sprogis v. Butler*, 647.)

30. DERAILMENT OF CAR—RES IPSA LOQUITUR—PLEADING—PROOF—INSTRUCTIONS.—Where in an action for damages for personal injuries received by a passenger upon one of the cars of a railway company which, through the alleged negligence of the latter, was derailed while rounding a curve, the complaint is fairly open to the construction that both general negligence on the part of the defendant in the management and operation of its car, and also specific acts of negligence on its part in maintaining a defective track and in rounding the curve at a dangerous rate of speed, are mingled in the same averment, and the case is tried upon the theory that the allegations of the complaint are such that upon proof of the accident and resulting injury a presumption of negligence upon the part of the defendant arises, and the court so instructs the jury, the defendant may not for the first time upon motion for a new trial, or upon appeal, raise the objection that the giving of instructions based upon the rule of *res ipsa loquitur* was error, the plaintiffs having failed to prove that the accident was caused by the specific acts of negligence alleged in their complaint. (*Bourguignon v. Peninsular Ry. Co.*, 689.)

31. CHARACTER OF ACCIDENT — PRESUMPTION OF NEGLIGENCE — HOW OVERCOME.—Where an accident is of such a character that it speaks for itself and raises a presumption of negligence, the defendant will not be held blameless except upon a showing either of a satisfactory explanation of the accident, that is, an affirmative

NEGLIGENCE (Continued).

showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. (Opinion of supreme court on denying hearing.) (Id.)

32. ACCIDENT TO PASSENGER—DEGREE OF CARE—PROOF.—In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, the explanation or care shown, as the case may be, must be satisfactory in the sense that the carrier is held to a very high degree of care. (Opinion of supreme court on denying rehearing.) (Id.)
33. EXERCISE OF DUE CARE—BURDEN OF PROOF.—In such case, the defendant is not obliged to overcome the presumption of *negligence* by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation or of his contention that he exercised due care in all particulars as to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence. (Opinion of supreme court on denying rehearing.) (Id.)
34. CONFLICTING EVIDENCE—FINDINGS—APPEAL.—In an action for damages for personal injuries sustained through having been struck by an automobile, the findings of the trial court based on conflicting evidence may not be disturbed on appeal. (Warner v. Bertholf, 776.)
35. USE OF STREET BY PEDESTRIAN.—A pedestrian has a right to the use of the street in the pursuit of her intention to board a street-car. (Id.)
36. DUTY OF PEDESTRIAN BOARDING STREET-CAR.—Where a street-car which a person desires to board stops some distance beyond the customary stop-sign, such person, after she has once assured herself that no automobile or other vehicle is approaching on her side of the street, is not bound to continue looking behind her while walking along the street in order to board such car. (Id.)
37. DUTY OF AUTOMOBILE DRIVER.—It is the duty of the driver of an automobile to see persons on the road in front of her where her view is unobstructed. (Id.)

See Employer and Employee, 6; Evidence, 12; Leases, 5-8; Municipal Corporations, 1, 2; Pleading, 1; Workmen's Compensation Act, 1.

NEW TRIAL.

NEWLY DISCOVERED EVIDENCE.—A trial court does not abuse its discretion in refusing a new trial applied for on the ground of newly discovered evidence where the new evidence is merely cumulative. (*Lutge v. Dubuque Fire Ins. Co.*, 658.)

See Appeal, 1, 9, 19, 34.

NONSUIT.

WHEN PROPER.—A court may grant a nonsuit only when, disregarding the conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legal inference which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. (*Grantham v. Ordway*, 758.)

See Appeal, 4, 6; Drafts; Employer and Employee, 6; Negligence, 7; Pleading, 4; Quieting Title, 1, 2, 4, 5.

NONUSER. See Easements, 1.

NOTICE. See Agency, 1, 4; Appeal, 8; Contracts, 10; Courts; Employer and Employee, 1, 2; Mechanics' Liens, 2, 18, 19; Municipal Corporations, 7, 8; Summons, 2; Taxation, 10.

NUISANCES.

1. **MUNICIPAL CORPORATIONS—EXCAVATIONS UNDER SIDEWALKS—IRON GRATINGS.**—An abutting owner, whose title extends to the center of the street, may excavate a vault or cellar under the sidewalk, and with the permission, express or implied, of the city authorities, may insert in the sidewalk, for the purpose of admitting light and air to the vault or cellar, an iron grating, or other similar device, if safely and properly constructed, and such contrivance in the sidewalk is not a nuisance *per se*. (*Runyon v. City of Los Angeles*, 383.)

2. **REPAIRS—DUTY OF OWNER.**—If such abutting property owner making the excavation and constructing the grating, coal-hole, or other similar device in the sidewalk does so with the permission of the proper city authorities, and the work is not inherently, in its nature and character, a nuisance *per se*, such owner is liable only in the event that he fails to use ordinary care and diligence in constructing the grating or other similar contrivance and keeping it in such repair that it shall be as safe for the use of the public as any other part of the sidewalk. (*Id.*)

See Injunction, 5.

OPTION. See Contracts, 21; Leases, 12.

ORDINANCES. See Evidence, 4; Pleading, 6; Taxation, 9.

PARENT AND CHILD. See Injunction, 1.

PARKS. See Municipal Corporations, 3.

PARTIES.

PLEADING—ACTION UPON JOINT AND SEVERAL LIABILITY—RIGHT TO PROCEED AGAINST CERTAIN DEFENDANTS ONLY—JUDGMENT.—In an action prosecuted against several defendants upon their joint and several liability, the plaintiff may, under section 414 of the Code of Civil Procedure, proceed against such of the defendants as have been served with process as if they were the only defendants, and the court may render a several judgment against any defendant therein without regard to the liability of any other defendant. (*Bakersfield Co. v. Bakersfield etc. Co.*, 703.)

See Judgments, 10; Mortgages, 2; Venue, 1, 2; Workmen's Compensation Act, 1-3.

PARTITION.

EASEMENTS—PARTITION OF LANDS HELD IN COMMON—SERVITUDES RESERVED.—Where tenants in common of a tract of land partition it between them, the one taking the southern half reserving certain servitudes in the northern half conveyed to his former cotenant, the servitudes or easements reserved can be charged only against the property covered by the partition deed and not against adjoining property subsequently acquired by the servient owner, section 1106 of the Civil Code relating to subsequently acquired title passing by operation of law having no application to such case. (*Parker v. Swett*, 68.)

PARTNERSHIP.

1. **ACTION AGAINST—FINDING AS TO EXISTENCE OF—SUFFICIENCY OF EVIDENCE.**—In this action against three alleged members of a copartnership, there was sufficient evidence to support the finding of the trial court that a copartnership was not shown to have existed between the defendants so as to render one of them liable upon the obligations created as between the other two and the plaintiff. (*Auditorium Co. v. Barsotti*, 592.)
2. **ADMISSIBILITY OF PAROL EVIDENCE.**—Where one of the defendants in such action had merely pledged his credit at a certain bank that the other two might secure certain money, in consideration of his receiving one-third of the profits to be derived from the enterprise contemplated by the other two defendants, and such

PARTNERSHIP (Continued).

money was to be repaid out of the first profits, the court properly admitted parol evidence to show that he was not a partner, notwithstanding the terms of the written agreement between the defendants strongly indicated that relationship between them, where the plaintiff had no knowledge of the existence of any partnership relationship between the three defendants and did not extend credit to them upon the belief that such relationship existed. (Id.)

3. WHAT CONSTITUTES — DIVISION OF PROFITS NOT SUFFICIENT.—

The mere oral agreement between two or more persons to divide the profits of an undertaking is not sufficient to constitute them partners. It is the association of two or more persons for the purpose of carrying on business together which is the distinguishing feature of a partnership. (Id.)

See Judgments, 12.

PAYMENT. See Guaranty, 2; Taxation, 8; Vendor and Vendee, 4.

PENALTIES. See Criminal Law, 16, 20.

PERFORMANCE. See Contracts, 38; Mechanics' Liens, 15, 18.

PERSONAL INJURIES. See Negligence.

PLACE. See Venue, 3.

PLEADING.

- 1. NEGLIGENCE—COMPLAINT INSUFFICIENT.**—Although it is not necessary for the term "negligence" to be used in pleading, it is necessary for it to appear by direct averment that acts causing an injury were done negligently, where the facts do not state a cause of action unless done negligently, unless the facts themselves necessarily exclude any hypothesis other than that of negligence. (South v. County of San Benito, 13.)
- 2. STATUTORY MODE OF PLEADING NOT EXCLUSIVE.**—While section 458 of the Code of Civil Procedure provides that the statute of limitations may be pleaded as a bar to any action, by giving the number of the section and subdivision thereof relied on, such mode of pleading is not exclusive. (Franklin v. Southern Pacific Co., 31.)
- 3. DEMURRER TO AMEND COMPLAINT SUSTAINED—REFUSAL OF FURTHER AMENDMENT—ERROR.**—Although an amended complaint was the third attempt of the pleader to state a cause of action, it was error, upon sustaining a demurrer thereto, to refuse to allow a further amendment, unless it was clear to the trial court that it could not be amended so as to obviate the objections made thereto. (Hamer v. Ellis, 57.)

PLEADING (Continued).

4. **DEMURRER TO COMPLAINT OVERRULED—MOTION FOR NONSUIT.**—Where an objection to the form of an action goes to the question of whether or not the complaint states a cause of action, and this question has been decided by the trial court in overruling a demurrer to the complaint, the question is not proper for consideration on motion for a nonsuit. (*Parker v. Swett*, 68.)
5. **AMENDED COMPLAINT—DEMURRER.**—Where a complaint has been amended, the sufficiency of the last pleading is alone in question on a demurrer. (*Church v. Grady*, 194.)
6. In pleading a municipal ordinance or a right derived therefrom it is sufficient, under section 459 of the Code of Civil Procedure, to refer to it by its title and the date of its passage. (*Id.*)
7. **GENERAL DEMURRER—INSUFFICIENT FACTS.**—Where the question of the sufficiency of a complaint to withstand a general demurrer arises, courts have always discriminated between insufficient facts and an insufficient statement of facts, and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated or appearing by necessary implication, the judgment will be sustained. (*Id.*)
8. **CONVERSION—TITLE—STRIKING OUT SECOND DEFENSE—WHEN NOT PREJUDICIAL.**—Where, in an action for damages for the conversion of personal property, the matter of plaintiff's title to the property is fully covered and put in issue by the allegations of the complaint and the first defense pleaded, and the court makes a finding thereon, the defendant is not prejudiced by a ruling of the court sustaining a general demurrer to a second defense pleaded which only puts in issue the same matter. (*Schutzer v. Taylor*, 322.)
- 8a. **CORPORATE EXISTENCE—INSUFFICIENT ALLEGATION.**—A complaint in an action by a corporation which alleges that it was incorporated on or about a stated date, but which does not allege that it continued to be such corporation for or at any time thereafter, or that it was a corporation at the time of any of the transactions referred to in its pleading, or at the time of the institution of the action, is demurrable. (*Consolidated Con. Co. v. McConnell*, 443.)
9. **ACTION TO CANCEL DOCUMENTS—EXISTENCE OF—INSUFFICIENT COMPLAINT.**—Where the main purpose of an action is to have certain documents rescinded, canceled, and surrendered, and there is no allegation in the complaint that such documents ever in fact came into being or were in existence or in the possession of or under the control of the defendant at the time the action was begun, the complaint is insufficient. (*Id.*)

PLEADING (Continued).

10. **RECOVERY OF MONEY—BONA FIDE STOCKHOLDERS—ESSENTIAL ALLEGATIONS.**—Allegations that the defendant used the corporation as a "tool and catpaw" of himself and a fellow-conspirator, and as a "means and instrumentality of defrauding and swindling the public, by which process he wrongfully and fraudulently" received from the corporation a stated sum of money "paid into said company by the public as the proceeds of plaintiff's stock," are entirely insufficient to base a right of action in favor of the corporation for the recovery of the money, where there is no allegation as to the existence of *bona fide* stockholders of the corporation not parties to the wrongful acts. (Id.)
11. **ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND—DISCRETION.**—The refusal of leave to amend after sustaining a demurrer to a fifth amended complaint is not an abuse of discretion. (Id.)
12. **COUNTERCLAIM—RES JUDICATA.**—In an action to recover the purchase price of certain personal property sold and delivered, the contention that one of the causes of action set up as a counterclaim had been adjudicated in a former action is not tenable, where such counterclaim, although pleaded in such former action, did not exist at the time of the commencement thereof, but matured some months later, and, therefore, was not adjudicated in that case. (*Bauer's Law etc. Co. v. S. Proctor Co.*, 524.)
13. **WAIVER OR ESTOPPEL AS TO DEFENSE.**—If the plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to the defendant under the facts stated in the complaint, the facts constituting such waiver or estoppel must be pleaded in the first instance. (*Greely v. Noble*, 628.)
14. **OFFICE OF SUPPLEMENTAL COMPLAINT.**—A complaint (or one as amended) and a supplemental complaint are to be considered as separate pleadings, the office of the supplemental complaint being merely to bring to the notice of the court, and the opposite party, matters which occurred after the commencement of the action, and which do, or may, affect the rights asserted and the relief asked in the action, as originally instituted. (*Conlin v. Southern Pacific R. R. Co.*, 733.)

See Agency, 2; Appeal, 21; Contracts, 17, 25; Criminal Law, 22; Divorce, 29, 33; Equity; Fraudulent Conveyances, 1; Insurance, 1; Judgments, 5, 6; Landlord and Tenant, 1; Life Insurance, 4; Mechanics' Liens, 20; Mortgages, 3; Negligence, 1, 11, 30; Promissory Notes, 4; Public Officers, 4-7; Quieting Title, 6, 9, 10; Street Law, 1, 5, 12, 17; Waters and Watercourses, 4.

POLICE POWER.

1. **HEALTH REGULATION—DISCRETION OF LEGISLATURE.**—The adoption of measures for the protection of the public health is a valid exercise of the police power of the state as to which the legislature is necessarily vested with large discretion not only in determining what are contagious and infectious diseases, but also in adopting means for preventing the spread thereof. (In re Johnson, 242.)
2. **AFFLICTION WITH CONTAGIOUS DISEASE—ISOLATION.**—The isolation of one afflicted with a contagious or infectious disease is a reasonable and proper measure to prevent the increase and spread thereof. (Id.)
3. **ABUSE OF AUTHORITY DELEGATED—QUARANTINE.**—The fact that the authority delegated to those charged with the duty of enforcing the law may, in a given case, be abused, is no legal reason for denying the power to quarantine summarily in a case where grounds therefor concededly exist. (Id.)
4. **QUARANTINE REGULATIONS—JUDICIAL DETERMINATION OF INFECTION UNNECESSARY.**—It is not necessary that it be first judicially established by some proceeding in court that a person is afflicted with a contagious disease before that person can be subjected to quarantine regulations. (Id.)

POSSESSION. See Contracts, 30; Landlord and Tenant, 12.

PRESUMPTIONS. See Appeal, 37; Criminal Law, 21; Deeds, 13; Divorce, 4, 34; Evidence, 2, 14, 15; Guaranty, 3; Leases, 3, 12; Street Law, 15.

PRIVILEGED COMMUNICATIONS. See Fraudulent Conveyances, 4.

PROFITS.

1. **DETERMINATION OF MEANING.**—The terms "profits" and "net profits" depend for their meaning upon the nature of the business and properties with respect to which they are employed. (Cuneo v. Giannini, 348.)
2. **NET PROFITS—TRADING CORPORATION.**—As applied to a trading corporation which makes its main profits in buying, selling, exchanging, and generally handling both real estate and personal properties and securities, investing, enhancing, and turning over its capital through the process of dealing in the main in property in kind, the term "net profits" means not merely the difference between the receipts and disbursements, but also the difference between the original and the increased value of its assets. (Id.)
3. **INTERPRETATION BY PARTIES.**—The meaning to be given the term "net profits" as employed by the parties to a given contract,

PROFITS (Continued).

if the same is doubtful, must be determined in some measure at least by the interpretation which the parties themselves placed upon it during the life of the agreement in which it was used. (Id.)

PROHIBITION.

ACTS WITHIN JURISDICTION OF SUPERIOR COURT.—A superior court being a court of general jurisdiction, prohibition will not lie to prevent such court from proceeding to hear and determine a certain action and continuing in force a temporary injunction restraining the plaintiff and the sheriff from selling certain property under execution, even though the complaint in the action fails to state facts sufficient to warrant the action of the court. (Kelsey v. Superior Court, 229.)

PROMISSORY NOTES.

1. **WRITTEN INSTRUMENT—PROMISSORY NOTE OR GUARANTY—MONEY PAYABLE AS DIVIDENDS ON STOCK—MORTGAGE AS SECURITY—ASSIGNABILITY.**—A writing, secured by a mortgage, in the form of a promise to pay one thousand five hundred dollars on or before two years from its date, with interest after maturity, and reciting that the payee has received from the maker certain shares of corporation stock, on which the maker guarantees dividends for two years of \$750, provided that if in two years the dividends received amount to one thousand five hundred dollars, the note is to be canceled, and if they do not amount to \$750 each year, the note shall be credited with the dividends, and the maker at maturity shall pay the balance, is assignable under sections 954 and 1458 of the Civil Code, regardless of whether it be considered a promissory note or a guaranty for the payment of money. (Fratessa v. Roffy, 179.)
2. **CONTRACT OF INDEMNITY.**—There is nothing in the language of the note to support the contention of the respondents that the written instrument constitutes a contract of indemnity against loss incident to the purchase of the stock and that no cause of action could arise therefrom without such loss by the holder of both the shares and the note, and that the note would have no validity where it had been assigned without an assignment of the shares also. (Id.)
3. **NATURE OF INSTRUMENT.**—The instrument in question was neither a guaranty nor a warranty, but a direct promise to pay money with a proviso for the payment of the amount, in whole or in part, out of the dividends received by the payee from the shares. (Id.)
4. **CONSIDERATION—ACTION AGAINST MAKER—VIOLATION OF COVENANT RUNNING TO THIRD PARTY.**—In an action on a promissory note executed by the defendant to the plaintiff as part consideration for plaintiffs' interest in a certain corporation as repre-

PROMISSORY NOTES (Continued).

sented by certain shares of stock held by him therein, which was purchased by defendant under an agreement whereby plaintiff bound himself not to engage in any business in competition with such corporation for a period of five years, plaintiff's violation of such clause was not a matter which could be made the subject of a cross-complaint by the defendant. (*Cavasso v. Downey*, 521.)

PROTEST. See Taxation, 8, 9.

PUBLIC OFFICERS.

1. **LIABILITY OF PUBLIC OFFICERS—RULE.**—Under the law of this state, before a public official becomes liable for a breach of duty, the duty must be plain and mandatory, the means and ability to perform it must exist, and it must be such as not to involve the exercise of any discretion on his part, either as to its performance or nonperformance or as to the manner of its performance. (*South v. County of San Benito*, 13.)
2. **POWERS OF SUPERVISORS—NONLIABILITY.**—Other than the power given by section 2713 of the Political Code to the boards of supervisors of two counties to construct a bridge across the line between the counties and to apportion the cost as previously agreed, the supervisors of one county had no authority to repair the road in the other county where the accident occurred, or to place warning signals thereon, and they cannot, therefore, be charged with liability under the provisions of section 1 of the act of April 26, 1911 (*Stats.* 1911, p. 1115). (*Id.*)
3. **PROCEEDING FOR REMOVAL—ACCUSATION UNDER SECTION 772, PENAL CODE.**—An accusation presented under section 772 of the Penal Code is an accusation of a public offense, to wit, neglect of official duties, or misfeasance in office, the proceeding being criminal, and, in its nature, a prosecution for crime, the penalty wherefor is removal from office, and a fine of five hundred dollars that goes to the informer. (*Dorris v. McKamy*, 267.)
4. **INSUFFICIENT ACCUSATION—WANT OF JURISDICTION.**—If an accusation filed against a public officer under section 772 of the Penal Code wholly fails to state a case sufficient to constitute an offense under the criminal law of the state, the court is without jurisdiction, and the sentence or judgment is void, and subject to collateral attack. (*Id.*)
5. **OFFENSE NOT CHARGED IN ACCUSATION.**—An accusation by a private citizen against a city marshal, filed pursuant to section 772 of the Penal Code, for neglect in the performance of official duty, fails to state facts constituting an offense known to the criminal law of this state, where it is alleged that he failed to cause the arrest or prosecution of women whom he knew were occupying and living

PUBLIC OFFICERS (Continued).

in houses of prostitution openly and notoriously, and dressing and conducting themselves in a vile and indecent manner, no warrant for their arrest having been delivered to him, and the crime not having been committed in his presence. (Id.)

6. **REMOVAL OF PEACE OFFICER—FAILURE TO ARREST FOR MISDEMEANOR—ESSENTIAL FACTS.**—Where it is sought to remove a peace officer from his office upon the ground that he “has refused or neglected to perform the official duties pertaining to his office,” in that he has refused or neglected to arrest, for a crime amounting to a misdemeanor only, some person whom, it is claimed, it was his duty to arrest—no warrant for such arrest having been issued—two things are essential: (1) That the person whom it is claimed should have been arrested committed or attempted to commit a misdemeanor; and (2) that the misdemeanor was committed or attempted to be committed in the officer’s presence. (Id.)
7. **CHARGE THAT OFFICER “PERMITS” COMMISSION OF MISDEMEANORS—AFFIRMATIVE ACTS NOT IMPLIED.**—An allegation in an accusation by a private citizen whereby it is sought to remove a city marshal from office, pursuant to the provision of section 772 of the Penal Code, that such officer “permits” certain persons to commit certain alleged misdemeanors, amounts to no more than that having received no warrant issued upon a complaint sworn to by some person moved thereto by a proper sense of civic duty, and not having seen “committed in his presence” any acts sufficient to constitute any of the offenses denounced by the Penal Code, he made no arrests. (Id.)

See Contracts, 1; Deeds, 11.

QUIETING TITLE.

1. **DISCLAIMER BY ONE DEFENDANT—NONSUIT AS TO ALL DEFENDANTS.**
In an action to quiet title to certain easements, the granting of a nonsuit in favor of all defendants was clearly erroneous as to one of the defendants who had expressly disclaimed any interest in the rights sought to be quieted. (Parker v. Swett, 68.)
2. **NONSUIT AS TO ALL EASEMENTS—ADMISSION THAT PLAINTIFF ENTITLED TO SOME.**—A judgment of nonsuit as to all easements claimed by plaintiff should be reversed when defendants concede that plaintiff is entitled to three of the easements claimed. (Id.)
3. **STATUTE OF LIMITATIONS—RIGHT OF WAY FOR PIPE-LINE.**—In order for the statute of limitations to run against a cause of action to quiet title in plaintiff to a right of way for a pipe-line, there must be positive and definite evidence of an adverse claim and an adverse holding. (Id.)

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QUIETING TITLE (Continued).

4. **NONSUIT—PROPERLY DENIED WHERE SUBSTANTIAL INTEREST SHOWN.**
In an action to quiet title, where plaintiff shows title to a two-thirds interest, a nonsuit is properly denied. (*Bublitz v. Reeves*, 75.)
5. **DENIAL OF NONSUIT—EVIDENCE SUPPLIED ON FURTHER HEARING.**—
If, after the denial of a nonsuit, evidence is introduced on further hearing, and upon the conclusion of the whole case there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying the nonsuit becomes of no consequence. (*Id.*)
6. **TAX DEED SET OUT IN ANSWER—FAILURE TO DENY BY AFFIDAVIT—ADMISSION OF GENUINENESS.**—The genuineness and due execution of a tax deed set up in defendant's answer in an action to quiet title is admitted under section 448 of the Code of Civil Procedure by failure of the plaintiff to file an affidavit denying the same. (*Id.*)
7. **ESTOPPEL FROM DENYING VALIDITY.**—But such admission of the genuineness and due execution of the tax deed does not estop the plaintiff from denying its validity in any other respect. (*Id.*)
8. **TAX TITLE—EVIDENCE—DEED TO STATE.**—In an action to quiet title where defendant claims title under a tax deed, it is essential for him to produce in evidence a deed to the state as well as a deed from the state; a recital in the deed from the state that the property was sold and conveyed to the state for nonpayment of taxes is insufficient. (*Id.*)
9. **PLEADING—DERAIGNMENT OF TITLE—OWNERSHIP—CONCLUSION OF LAW.**—Where the plaintiff in an action to quiet title pleads the specific and detailed facts of her ownership and right of possession to the property in controversy and her special equities growing out of the relations of the parties, the further allegation that "by the proceedings hereinabove mentioned the plaintiff has become, and by such proceedings she now is, the owner of said real property and of the whole thereof," is but a conclusion of law, the denial of which in the answer will raise no issue. (*Davies v. Ramsdell*, 424.)
10. **INSUFFICIENT ANSWER—JUDGMENT OF PLEADINGS.**—Where in such action the only denial was of the conclusion of law that the plaintiff was "the owner of said property and the whole thereof," the court properly granted plaintiff's motion for judgment on the pleadings. (*Id.*)
11. **FINDINGS OF OWNERSHIP—JUDGMENT.**—In an action to quiet title, ultimate findings of the fact of ownership in the defendants and lack of ownership in the plaintiff will support a judgment in

QUIETING TITLE (Continued).

favor of the defendants, unless the findings of probative facts are at variance with such finding of ownership. (McFarland v. Walker, 508.)

See Right of Way, 1, 2.

RAILROADS. See Deeds, 8, 12.

RECEIVERS.

1. **EQUITY — DISCRETION — PRESUMPTION.**—Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of such power rests very largely in the discretion of the chancellor. Every presumption is in favor of the regularity of the order. (Davies v. Ramsdell, 432.)
2. **CONFLICTING AFFIDAVITS—WHICH PREVAIL.**—If there is any conflict in the affidavits presented to the court, those in favor of the prevailing party must be taken as establishing the facts stated therein, and also all facts which may reasonably be inferred or presumed from the direct and positive statements. (Id.)
3. **ACTION TO REMOVE CLOUD FROM TITLE—ERRONEOUS APPOINTMENT OF RECEIVER—APPEAL.**—In an action in equity to remove a cloud on title, an order appointing a receiver *pendente lite*, though erroneous, will not be reversed on appeal where the appellant had no right to the possession of the property nor to collect its rents. (Id.)

See Divorce, 5-7.

RECLAMATION DISTRICTS.

1. **RECLAMATION BOARD ACT — NATURE OF DISTRICT — FORMATION — POWER OF LEGISLATURE.**—Reclamation districts are, in strictness, not corporations at all, but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose. It would be perfectly legal and competent for the legislature, delimiting a tract of land, itself to appoint a commissioner or commissioners to perform all of the functions which, under the existing schemes, are performed by the trustees and the assessors. (Argyle Dredging Co. v. Chambers, 332.)
2. **RECLAMATION BOARD ACT—SACRAMENTO AND SAN JOAQUIN DRAINAGE DISTRICT—PURCHASE OF WARRANTS BY STATE—SPECIAL LEGISLATION.**—The act of January 30, 1919, "authorizing the State Board of Control to purchase warrants of the Sacramento and San Joaquin Drainage District issued in payment for the expense of continuing the construction of the east levee of the Sutter By-pass; appropriating money therefor, and providing reimbursement to the State of such appropriation," is not unconstitutional as violative of section

RECLAMATION DISTRICTS (Continued).

25, article IV, of the state constitution, which prohibits special laws in all cases where a general law can be made applicable. (Id.)

3. **LENDING CREDIT OF STATE—MAKING GIFT—CONSTITUTIONALITY OF ACT.**—Such act of January 30, 1919, does not violate section 31, article IV, of the state constitution, which prohibits the giving or lending the credit of the state or making a gift "to any individual, municipal or other corporation whatever." (Id.)
4. **ACT OF JANUARY 30, 1919—CONSTRUCTION OF—EFFECT OF APPROPRIATION OF MONEYS.**—Such act of January 30, 1919, is neither more nor less than an act authorizing the state board of control to invest state money in the warrants duly and regularly issued under the act. The fact that an appropriation of moneys was made to meet the anticipated purchase did not affect the power of the legislature to make the appropriation or the power of the board to make the investment. (Id.)

REPRESENTATIONS. See *Streets*, 2, 3, 5.

RESCISSION. See *Contracts*, 10, 29-32; *Sales*, 5.

RESERVATIONS. See *Contracts*, 14.

RES IPSA LOQUITUR. See *Negligence*, 8.

RES JUDICATA. See *Divorce*, 8.

RETURN. See *Street Law*, 16.

RIGHT OF WAY.

1. **RIGHT OF WAY FOR PIPE-LINE—ACTION TO QUIET TITLE.**—An action will lie to quiet title to a right of way for a pipe-line, although the line has not been constructed. (*Parker v. Swett*, 68.)
2. **REASONABLE ROUTE.**—Where the route for a pipe-line is not definitely described in the deed, a reasonable route is intended, and title may be quieted to such reasonable route. (Id.)
3. **COURT TO DESIGNATE ROUTE.**—A court of general equitable jurisdiction will in such case designate for the parties what would be a reasonable route under all the circumstances in evidence. (Id.)
See *Contracts*, 12, 13; *Deeds*, 8, 9; *Easements*, 17, 20-23.

RIPARIAN OWNERS.

1. **ERRONEOUS LIMITATION OF RIGHTS TO DIVERT WATER.**—The plaintiff in the present action being a riparian owner, the court erred in attempting by the decree to limit his right to divert the water

RIPARIAN OWNERS (Continued).

to a fixed quantity, since as a riparian owner he had the right to have all the waters flow through his land in their accustomed way except as decreased by the reasonable use of other riparian proprietors or prior appropriators. (*Felsenthal v. Warring*, 119.)

2. **APPROPRIATOR'S RIGHT TO WATER—DEFENDANT'S OWNERSHIP OF WATERS OF CREEK—FINDING UNSUPPORTED BY EVIDENCE.**—In such action a finding that the defendants owned the waters of the creek to the extent of sixty inches, that being the capacity of the defendants' ditch, was unsupported by evidence and erroneous, since the extent of an appropriator's or adverse user's right is limited not by the quantity of water actually diverted, nor by the capacity of his ditch, but by the quantity which is or may be applied by him to his beneficial uses, and there was direct evidence in the record that sixty inches greatly exceeded the amount necessary for the defendant's beneficial uses. (*Id.*)

ROSEBERRY ACT. See Employer and Employee, 1.

RULES. See School Law, 1-4.

SALES.

1. **TITLE OF BUYER.**—The buyer of personal property, though the sale is not followed by immediate delivery and actual and continued change of possession, acquires good title as against all the world except creditors of the original vendor and against them also if he is a purchaser in good faith for value and without notice. (*Garn v. Thorwaldson*, 62.)
2. **PURCHASE OF MACHINERY FOR PARTICULAR PURPOSE—DEFECTS—KNOWLEDGE OF PURCHASER—FAILURE OF CONSIDERATION.**—Where machinery is bought for a certain purpose, and after it is received it proves by trial not to be adapted to the purpose, but the purchaser nevertheless retains it, an action for the price cannot be defeated upon the plea of total failure of consideration, unless the evidence shows that the machinery was wholly valueless for any purpose. (*Imperial Gas Engine Co. v. Auteri*, 419.)
3. **DUTY OF PURCHASER UNDER EXECUTORY CONTRACT—WAIVER OF DEFECTS.**—The purchaser under an executory contract for the sale of personal property is bound to accept the property, provided it conforms to the terms of the contract. Although the property may not be of the quality or description contracted for, he may, nevertheless, if he so elect, waive the defect, and acceptance of the property offered constitutes such a waiver. The duty devolves upon the purchaser to make an examination of the property tendered or delivered for the purpose of determining whether it fills the contract, and if from such examination he finds it does not, he must promptly reject it. This duty of inspection must be exer-

SALES (Continued).

cised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case. (Id.)

4. **ACTION TO RECOVER BALANCE—FAILURE OF CONSIDERATION AS DEFENSE—CONTRACT NOT FULFILLED.**—In this action to recover a given sum alleged to be due as the final payment for a certain gasoline engine, the defendant having set up in his answer failure of consideration, it clearly appeared that the plaintiff never furnished and installed an engine and equipment as required by its contract with defendant, and that the latter's efforts and complaints were directed toward enforcing the proper fulfillment of the contract, and not merely concerning the installation of a magneto as part of the equipment. (Id.)
5. **PAYMENT BY CHECK—RESCISSION—RIGHT TO PROPERTY—CLAIM AND DELIVERY.**—If the purchaser of an automobile from the representative of the owner delivers to such representative his post-dated check, payable to such representative, for the amount of the purchase price, and takes possession of the automobile, but before such check becomes payable redelivers the automobile to the owner and stops payment on the check as to both the owner and the representative, he withdraws the entire consideration for, and works a complete rescission of, the sale as effectually as if the check had been returned to him, and thereafter he has no interest in, or right of possession of, the automobile, and may not maintain an action in claim and delivery therefor. (Alchian v. MacDonald, 505.)
6. **LOSS OF GOODS EN ROUTE—ASSUMPTION OF RISK.**—The risk of loss or destruction of goods while en route from seller to purchaser is placed where the title resides. (Henderson v. E. Lauer & Sons, 696.)
7. **C. O. D. SHIPMENTS—PASSAGE OF TITLE—INTENT—PRESUMPTION.**—Where goods are shipped C. O. D. and the bill of lading with draft attached is sent to the local bank of the purchaser, it will be presumed, in the absence of evidence showing a contrary intention, that the vendor did not intend that the ownership and right to the possession of the goods should pass to the purchaser until the draft was paid. (Id.)

See Contracts, 2, 21, 31, 33; Deeds of Trust, 1, 2; Guaranty, 2.

SAN FRANCISCO CHARTER. See School Law, 4, 5.**SCHOOL LAW.**

1. **RULES OF BOARD OF EDUCATION—SUSPENSION OR NONOBSERVANCE—WHO MAY COMPLAIN.**—A rule adopted by a board of education prescribing the procedure by which its rules may be amended or repealed is merely a rule of parliamentary procedure adopted for the guidance, and it may be the protection, of the

SCHOOL LAW (Continued).

members of the board, which they have power to suspend or ignore when occasion requires, and in respect to their action in so doing, no one but the members of the board have a right to complain. (Grosjean v. Board of Education, 434.)

2. **SUSPENSION BY UNANIMOUS ACTION.**—Such a rule is effectually suspended by the board through its unanimous action in passing an amendment without the formality prescribed therein. (Id.)
3. **AMENDMENT OF RULES — NOTICE TO TEACHERS.**—A teacher may not be heard to complain that she was not legally notified of a change in the rules, in that the principal failed to paste in her copy of the rules a copy of the change or amendment as required by the rules of the board, where she was personally made acquainted with the changed rule through having read the same. (Id.)
4. **SAN FRANCISCO CHARTER — DUTIES AND RELATIONS OF SUPERINTENDENT OF SCHOOLS — GENERAL LAW OF STATE.**—The charter of the city and county of San Francisco, in assigning to the superintendent of schools, who is made by the charter an *ex-officio* member of the board of education, the specific duty of presenting charges against teachers for violations of the rules of the board, is to be regarded as a state law of equal dignity with the general laws of the state so long as it is not in conflict with them. (Id.)
5. **BIAS OR PREJUDICE OF SUPERINTENDENT OF SCHOOLS — DUTY TO PRESENT CHARGES.**—Since the charter expressly imposes upon the superintendent of schools the duty of presenting such charges, any bias or prejudice which he might have will not affect his right and duty to prepare and present the charges. (Id.)
6. **HEARING OF CHARGES — DISQUALIFICATION OF SUPERINTENDENT OF SCHOOLS.**—A teacher who has been dismissed cannot raise the objection, in a proceeding in *mandamus* to secure her reinstatement, that the superintendent of schools by reason of bias or prejudice, was disqualified to sit as a member of the board in the hearing and determination of charges which he had himself in the character of a prosecutor laid before that body, where her petition affirmatively shows that such superintendent of schools, while *ex officio* a member of the board, did not in fact sit or act as a member of the board in the final determination thereon. (Id.)
7. **QUASI-JUDICIAL TRIBUNALS — RULES AS TO DISQUALIFICATION.**—In relation to the acts of such inferior and only quasi-judicial tribunals as boards of education, boards of supervisors, town councils, and other governing bodies of public subdivisions or municipal corporations, the rules relating to the disqualification of regular judicial tribunals or officers have but a limited application. (Id.)
8. **DISQUALIFICATION FOR BIAS OR PREJUDICE — PRESENTATION OF OBJECTION.**—An objection that the board of education is disquali-

SCHOOL LAW (Continued).

fied by reason of bias or prejudice to hear and determine the charges presented by the superintendent of schools must be presented at the inception of the hearing and must be supported by affidavits. (Id.)

SIGNATURES. See Municipal Corporations, 4; Street Law, 16.

SPECIFIC PERFORMANCE. See Contracts, 15, 16, 18, 19, 42; Vendor and Vendee, 6.

STATUTE OF FRAUDS. See Contracts, 47.

STATUTE OF LIMITATIONS.

1. **SUFFICIENCY OF ACKNOWLEDGMENT OF DEBT.**—An acknowledgment of a debt sufficient to take the case out of the operation of the statute of limitations must be a distinct, unqualified, unconditional recognition of the obligation for which the person making such admission is liable. (Nixon v. Ramsey, 240.)
2. **PAYMENT OF OUTLAWED PROMISSORY NOTES—INSUFFICIENT ACKNOWLEDGMENT.**—A written indorsement on a letter demanding payment of certain outlawed promissory notes that "It is impossible right at the Present time—For me to Pay any Part of the above amount—I Hope to be able Some time Soon to hole thing up—I am not making any Promises—I hope to be able to Pay the hole thing up *Some day*," is not an acknowledgment of the debt, within the contemplation of section 360 of the Code of Civil Procedure, sufficient to take the case out of the operation of the statute of limitations. (Id.)

See Adverse Possession, 3; Animals; Contracts, 41, 43, 44; Corporations, 12, 13; Pleading, 2; Waters and Watercourses, 3, 4.

STATUTORY CONSTRUCTION. See Mechanics' Liens, 13.

STIPULATIONS. See Divorce, 14.

STOCKHOLDERS' LIABILITY. See Corporations, 11.

STREET LAW:

1. **SAN FRANCISCO ORDINANCE—FORECLOSURE OF ASSESSMENT LIEN—RESOLUTION OF INTENTION.**—In an action to foreclose the lien of a street assessment for work done under the San Francisco street improvement ordinance, the objection that the complaint does not state that the resolution of the board of public works of its intention to recommend to the supervisors that improvements be

STREET LAW (Continued).

ordered to be made contains the reference to the specifications or plans and specifications prepared for the improvement contemplated, is sufficiently met by the allegation that the board of public works duly and regularly made an assessment to cover the sum due for the said work so performed and specified in said contract, this being a sufficient allegation under the ordinance that all the steps preceding the making of the assessment necessary to authorize the board to make it had been taken in the manner provided by law. (*Church v. Grady*, 194.)

2. **DEMAND FOR PAYMENT.**—In a suit to foreclose a street assessment lien under the San Francisco ordinance, a failure to prove a compliance with the essential requirement of the ordinance respecting a demand on the owner of the property assessed, for the payment of the amount of the assessment as alleged in the complaint is fatal to the judgment. (*Id.*)
3. **IMPROVEMENTS UNDER PUBLIC CONTRACT—PERSONAL LIABILITY OF PROPERTY OWNER.**—No personal liability can be constitutionally imposed upon a property owner for street improvement under a public contract, but the cost thereof may be imposed as a lien or charge upon the specific property benefited. (*Flinn v. Zerbe*, 294.)
4. **SAN FRANCISCO CHARTER AND ORDINANCE—LIEN FOR IMPROVEMENTS.**—Under section 33, article VI, chapter II, of the charter of the city and county of San Francisco, the board of supervisors had authority to enact, as they did in Ordinance No. 2439 (New Series), that the contractor performing street work thereunder should have a lien upon the property benefited by the improvement for the cost thereof. (*Id.*)
5. **DESCRIPTION OF DISTRICT—PLEADING—FINDING.**—In an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work, an allegation "that said resolution [of intention] described the district," is susceptible of no other construction than that the district was described so as to be *capable of identification*, and where such allegation is not denied, a finding "that the description of the district as given in said resolution of intention was not sufficient to identify the same," etc., is outside of the issues and contrary to the allegations of plaintiff's complaint. (*Ahlman v. Barber Asphalt Pav. Co.*, 395.)
6. **ASSESSMENT—INCLUSION OF IMPROPER ITEM—APPEAL—WAIVER.**—An objection to a street assessment on the ground that it includes an item paid to an abstract company for search of record on the property to ascertain the exact frontage of the lots is waived by failure to present such objection to the council on appeal to that body. (*Id.*)

STREET LAW (Continued).

7. **OMISSION OF LOT—REMEDY.**—If a lot in an assessment district is omitted from the assessment, the remedy of a property owner feeling aggrieved thereby is by appeal to the council. (Id.)
8. **SUFFICIENCY OF APPEAL—PROOF.**—On such an appeal, it is not sufficient for the property owner to allege that various parcels of property within the district have not been assessed to pay their proportionate share of the cost, but he must specify and designate the lot or lots which he claims were omitted, and on the hearing present evidence to the council to support his claim. (Id.)
9. **ISSUANCE OF BONDS—PROCEDURE TO PREVENT.**—Since section 4 of the Bond Act of 1893 (Stats. 1893, p. 33) provides a simple procedure whereby a property owner may prevent the issuance of any bond for the assessment of his lot, he is in no position to complain of the issuance of bonds where he has not pursued the course prescribed. (Id.)
10. **"NO SUFFICIENT LEGAL RESOLUTION"—CONCLUSION OF LAW.**—In an action to quiet title and to restrain the issuance of bonds upon plaintiff's property for street work, a finding that "no sufficient legal resolution" of intention was passed is a conclusion of law. (Id.)
11. **STREET OPENING ACT OF 1903—ABANDONMENT OF PROCEEDINGS—ATTORNEYS' FEES—CONSTITUTIONAL LAW.**—The provision of section 14 of the Street Opening Act of 1903, as amended in 1911, that if the proceedings to condemn and take land for street purposes "be abandoned or the action dismissed no attorneys' fees shall be awarded the defendants or either or any of them," is contrary to the limitations prescribed by the constitution, and, therefore, may not be enforced. (*City of Los Angeles v. Cline*, 487.)
12. **SAN FRANCISCO ORDINANCE—ACTION TO FORECLOSE LIEN—PROPER APPORTIONMENT OF ASSESSMENT—INSUFFICIENT ANSWER.**—In this action to foreclose a lien for street work under public contract there was no denial of plaintiff's averment that the board of public works "duly and regularly" made an assessment to cover the sum due for the work performed in conformity with the provisions of the San Francisco Street Improvement Ordinance (No. 2439), sufficient to raise the issue as to whether or not such board properly apportioned the assessment as directed by such ordinance; and the averment of the defendants' answer was ineffectual to present such issue. (*McGinn v. Van Ness*, 600.)
13. **DEFECTIVE ASSESSMENT—IRREGULARITY—REMEDY.**—Even though such assessment was defective in that it was not properly apportioned as directed by the ordinance, the defect was not such as would render the assessment void upon its face, but at most was

STREET LAW (Continued).

only an irregularity which could and doubtless would have been corrected upon an appeal to the proper board under section 21 of the ordinance in question. (Id.)

14. **ERRORS CONSTITUTING DEFENSE TO ACTION.**—It is only such errors as are jurisdictional and which appear upon the face of the assessment that may be taken advantage of upon the trial without an appeal having been first made to the board. (Id.)
15. **RECORDATION OF WARRANT, ASSESSMENT, AND DIAGRAM—COLLECTIVE INDORSEMENT.**—Where the record shows that the warrant, assessment, and diagram were indorsed as having been duly recorded on the same day on which they were filed of record, the fair intendment is that this indorsement was made upon the originals where it should appear. The fact that such indorsement was collective as to all three of these documents and not made upon each separately is immaterial. (Id.)
16. **FAILURE OF SECRETARY TO AUTHENTICATE RECORD.**—The failure of the secretary of the board of public works to attach his signature to the record of the return of the assessment and warrant does not render the lien invalid nor prejudice the holder of the warrant. (Id.)
17. **VROOMAN ACT—CAREFUL ESTIMATES OF COSTS AND EXPENSES—FURNISHING BY CITY ENGINEER—COMPLIANCE WITH ACT—PLEADING.**—In an action to quiet title against a lien arising out of the issuance of a bond for street improvements, an allegation in the answer "that before the passing of the resolution . . . careful estimates of the costs and expenses thereof had been required by it to be furnished to said common council by the city engineer of said city," in the absence of special demurrer, shows a sufficient compliance with section 3 of the Vrooman Act, which provides that "before passing any resolution for the construction of said improvements, plans and specifications, and careful estimates of the cost and expenses thereof *shall be furnished* to said city council *if required* by it, by the city engineer of said city." (Stock v. Sites, 645.)
18. **STATEMENT OF ESTIMATES—WHAT CONSTITUTES.**—A furnishing by the city engineer of specifications or a specification of "a careful estimate" is in substance and effect the furnishing by him of a statement of the estimates. (Id.)

See Summons, 1, 2.

STREETS.

1. **DEDICATION—UNEXECUTED INTENTION.**—An unexecuted intention to dedicate certain land to street purposes is not sufficient to constitute dedication. (Shermaster v. California Bldg. etc. Co., 661.)

STREETS (Continued).

2. **VENDOR AND VENDEE—REPRESENTATION AS TO PUBLIC STREET—NATURE OF.**—A representation by the vendor of real property that the lands front on a named public street relates to the means of physical access to the property, and does not refer to an intangible quality in the roadway giving it the status of a public street. (Id.)
3. **FALSE REPRESENTATION AS TO STREET—RIGHTS OF VENDEE.**—A false statement by a vendor that the real property agreed to be sold to the vendee is bounded by a public street, on the front, is a most material representation, and upon discovery that such representation is false, the vendee is entitled to demand, and recover, the consideration paid by him, also to recover the value of the improvements made on the premises, after deducting therefrom the fair rental value of the property. (Id.)
4. **KNOWLEDGE OF TRUTH OF REPRESENTATIONS — ESTOPPEL.**—If the vendee avails himself of an opportunity to test the truth of the representations made by the vendor, and thereby discovers prior to the consummation of the contract that such representations are false, or by the exercise of reasonable diligence could have so ascertained, he will not be heard to say that he was deceived by them. (Id.)
5. **REPRESENTATIONS OF VENDOR—RIGHT OF VENDEE TO RELY ON.**—Where the vendee, who was but a laborer and not accustomed to buying land, was given a map showing the existence of a street in front of the property, and the result of the physical examination of the property made by him, before entering into the contract to purchase the first lot, was not such as to destroy his belief in, and reliance on, the vendor's representations, he was entitled to rely on such representations. (Id.)

See Negligence, 35.

SUMMONS.

1. **SERVICE—RETURN—JURISDICTION—DISMISSAL OF ACTION.**—The failure of the plaintiff, in an action to foreclose a street assessment lien for work done pursuant to the provisions of the Vrooman Act, to cause the summons, with proof of service thereof, to be returned within three years after the commencement of the action, deprives the court of jurisdiction to take any other action than to dismiss the case. (*Ransome-Crummey Co. v. Wood*, 355.)
2. **DISMISSAL BY COURT—NOTICE.**—Where the plaintiff has failed to return the summons with proof of service thereof, within three years after the commencement of the action, the court can dismiss the case without notice to either of the parties. (Id.)

See Judgments, 5.

SUPERVISORS. See Public Officers, 2.

SUPPLEMENTARY PROCEEDINGS.

1. **THIRD PARTY CLAIM—UNWARRANTED ORDER.**—In a proceeding supplementary to execution, an order directing a third person who was not a party to the action but who has possession of goods belonging to the judgment debtor to deliver such goods to the judgment creditor, is wholly unwarranted where such party claims an interest in the goods. (*Colyear v. Superior Court*, 462.)
2. **WAREHOUSEMAN'S LIEN—ADVERSE CLAIM.**—One who claims a warehouseman's lien on property claims an interest in such property adverse to the owner. (*Id.*)
3. **DETERMINATION OF RIGHTS OF PARTIES—PROCEDURE.**—A person claiming property adverse to a judgment debtor is entitled to his day in court, with an opportunity for the determination of his rights in an ordinary action, as specified in section 720 of the Code of Civil Procedure, which provides that, in a proceeding supplementary to execution, if it appears that a person having property of the judgment debtor claims an interest therein adverse to such judgment debtor, the judgment creditor may maintain an action against such person for the recovery thereof; and the court may by order forbid a disposition or transfer of the property until an action can be commenced and prosecuted to judgment. (*Id.*)
4. **ORDER IN EXCESS OF JURISDICTION—VIOLATION—CONTEMPT.**—Where, in a proceeding supplementary to execution, the court makes an order directing a third person to turn over to the judgment creditor property of the judgment debtor in which said third person claims an interest adverse to said judgment debtor, it acts in excess of its jurisdiction, and the violation of such order by said third person constitutes no warrant for adjudging such third person guilty of contempt and imposing punishment therefor. (*Id.*)

SURETIES. See Appeal, 25; Mortgages, 7.

TAXATION.

1. **EQUALIZATION OF ASSESSMENTS—HEARING BY BOARD—EVIDENCE—RECORD.**—In the equalization of the assessment of property for the purpose of taxation, there is no provision for taking down of evidence introduced before the county board of equalization at the hearing, or providing for a bill of exceptions to the rulings of such board; hence any question as to the sufficiency of the evidence to authorize the action of the board must be determined by an inspection of the record itself, in the absence of fraud or malicious abuse of power. (*H. & W. Pierce v. Santa Barbara Co.*, 302.)

TAXATION (Continued).

2. **SUFFICIENCY OF EVIDENCE—RECITAL CONCLUSIVE.**—Where evidence was taken at the hearing before the board of equalization in support of a raise in the assessed valuation of the property, the recital of that fact in the order forecloses discussion as to the sufficiency of the evidence. (Id.)
3. **REVERSAL OF VALUATION—EQUITY.**—Equity will not inquire into irregularities, nor reverse questions of valuation, unless the valuation is so grossly excessive as to be inconsistent with an exercise of honest judgment, or is so unequal and discriminating as to violate the fundamental law of the land. (Id.)
4. **VOID ASSESSMENT—MORAL OBLIGATION.**—In actions to recover taxes, as well as in actions to enjoin or set aside tax deeds, the law is that when there is a moral obligation to pay the tax, it cannot be revoked on account of some technical defect rendering the assessment void. (Id.)
5. **VALUE OF LAND—ELEMENTS.**—In arriving at the value of land used as a stock ranch, the board is not restricted to the value thereof when used for that particular purpose, but should take into consideration all its capabilities or the uses to which it is adapted. (Id.)
6. **JUDGMENT OF BOARD CONCLUSIVE.**—Where evidence is in fact taken by the board of equalization, its decision thereon raising an assessment is, in the absence of fraud, valid and conclusive, and its judgment not subject to the supervision of the courts. (Id.)
7. **ASSESSMENT-ROLL—OMISSION OF DOLLAR-MARKS AND PUNCTUATION—EFFECT.**—A taxpayer cannot recover taxes paid under protest because of the omission on the assessment-roll of the dollar-mark before the figures and the punctuation marks in the proper places, where it was not misled thereby but went into court and asked for the exact amount which it claims was paid in excess of that which it contends should have been paid. (Id.)
8. **LEGAL COERCION—PAYMENT UNDER PROTEST—RECOVERY.**—It is not essential to a recovery of a public tax that the person from whom payment thereof is demanded be threatened with actual imprisonment or threatened with the penalty of having his right to do business taken away. There may be penalties which fall perhaps short of this mark to avoid which the person paying may protect himself by protest. (*Home Telephone etc. Co. v. Los Angeles*, 492.)
9. **VOID MUNICIPAL ORDINANCE—THREATENED ENFORCEMENT OF PENALTIES.**—Payment under protest of license fees exacted under a void municipal ordinance may not be considered as voluntary where such ordinance provided not only for delinquency penalties, but also for the arrest of those who violated any of the provisions of the ordinance, with a possible fine and imprisonment, and

TAXATION (Continued).

the enforcement of the "penalties" of the ordinance was threatened if the fees were not paid. (Id.)

10. **SUFFICIENCY OF NOTICE OF PROTEST.**—Where such ordinance was in violation of the state constitution as amended, and the secretary of the plaintiff corporation had discussed with the license collector the effect of the amendment, and had claimed that under the amendment the plaintiff corporation should not be required to pay the tax, its written notice of protest filed at the time of the making of the license tax payments was sufficient, where such notice advised the license collector that the plaintiff corporation considered the ordinance void, and stated further that the ordinance was in violation of the constitution of the United States and of the fourteenth amendment thereof. (Id.)

TAX DEEDS. See Quieting Title, 6-8.

TAXES. See Eminent Domain, 4.

TENDER.

AMOUNT.—Nothing short of the full amount due the creditor is sufficient to constitute a legal tender, and the debtor must at his peril offer the full amount. (Rauer's Law etc. Co. v. S. Proctor Co., 524.)

See Contracts, 29; Judgments, 11.

TIME. See Contracts, 22; Leases, 11, 12, 15; Mechanics' Liens, 1, 10.

TITLE.

REGISTRATION UNDER MOTOR VEHICLE ACT.—The Motor Vehicle Act (Stats. 1913, p. 641, secs. 3, 4), requiring the owner of every automobile to cause an application for registration to be filed in the name of the owner, warrants a finding that the person in whose name an automobile is registered is in fact the rightful owner. (Hammond v. Hazard, 45.)

TORTS. See Corporations, 11; Employer and Employee, 4.

TRANSFER. See Trusts.

TRESPASS. See Animals.

TRIAL.

REOPENING HEARING OF EVIDENCE—DISCRETION OF TRIAL COURT.—It is within the discretion of the trial court to reopen the hearing of evidence at any time before the trial is concluded and until the decision of the court by its written findings, made and filed. (Bublitz v. Reeves, 75.)

TRUSTS.

FINDING AGAINST TRUST SUPPORTED BY EVIDENCE.—The evidence in this case is held sufficient to support findings and judgment that a transfer of stock was absolute and not charged with any trust. (Powell v. Powell, 155.)

See Contracts, 44, 45.

VENDOR AND VENDEE.

1. **SALE OF LAND—QUANTUM OF ESTATE.**—Where one party agrees to convey, and the other party agrees to purchase, all the former's right, title, and interest in and to his real estate, such contract means the sale and purchase of such interest as the first party has in the premises, and not any particular estate or fee simple. (California Land Security Co. v. Ritchie, 246.)
2. **BROKER'S COMMISSIONS—SALE OF PROPERTY—TERMS UNSATISFACTORY—DUTY OF VENDOR.**—Where property is sold to a purchaser able, ready, and willing to take and pay for the property, and any of the terms of the contract, abstract, or deed are unsatisfactory to the intending vendor, the latter should object to them on that ground and not refuse absolutely to sell; and where he fails to make such objection under such circumstances, he will be held liable to the broker negotiating the sale for his commissions if he refuses to accept the purchaser. (Id.)
3. **CONFLICTING EVIDENCE—FINDING.**—The finding of the trial court as to what transpired when the broker presented the contract of purchase to the intending vendor is conclusive on the appellate court where the evidence was conflicting. (Id.)
4. **TERMS OF PAYMENT—CHECK NOT CASH.**—The terms "one-half down and the balance in five equal annual payments" means a payment in cash down; and, though a payment by check may be a "cash payment," the vendor cannot be required to accept that mode of payment. If he objects to it, the objection is good and he need not bind himself to convey until the objection is removed by the offer at the time of a different method of payment, reasonable in character and satisfactory to him. (Id.)
5. **CONTRACT OR OPTION—TEST.**—The test determinative of the question whether a given agreement relating to the sale and purchase of land is an agreement to purchase and sell the property or a mere option to purchase the same is: Is the agreement capable of specific performance? (Id.)
6. **RIGHT OF ELECTION IN VENDEE—SPECIFIC PERFORMANCE.**—An agreement relating to the sale and purchase of land which gives to the buyer the choice of either purchasing the property on stated terms or refusing to complete the purchase and so forfeiting to the seller a sum fixed in the contract as damages for such noncompliance,

VENDOR AND VENDEE (Continued).

is wanting in mutuality and, therefore, not capable of specific performance. (Id.)

7. **BROKER'S COMMISSIONS—DUTY OF AGENT.**—A broker, to be entitled to the agreed commission, must produce a purchaser able, willing, and ready to purchase; and where he produces a proposed purchaser, who reserves to himself the right of election either to purchase or arbitrarily refuse to do so, or to refuse to purchase, even though a perfect title be shown, the broker has not produced a purchaser ready and willing to purchase, even though he has the ability to do so. (Id.)

8. **EXCLUSIVE AGENCY—SALE BY OWNER.**—Where the agreement vests in the broker an exclusive agency and so makes it the sole agent for the sale of the property for a given period, but does not confer on such broker the exclusive right to sell, the owners, either collectively or individually, might, pending the period of the agency and before the broker has secured a purchaser or a valid agreement from a proposed purchaser willing and able to make the purchase according to the authorization to sell previously executed, sell or make sale without becoming liable for commissions. (Id.)

See Contracts, 43; Fraud; Streets, 2, 5.

VENUE.

1. **DEFENDANT AGAINST WHOM CAUSE OF ACTION NOT STATED—RIGHT OF CODEFENDANT.**—The joinder, as defendant, of one against whom no cause of action is stated does not deprive other defendants of the right to have the action tried in the county of their residence. (South v. County of San Benito, 13.)

2. **FICTITIOUS DEFENDANTS.**—A fictitious defendant who has not been brought into court cannot be regarded in considering a motion for a change of venue. (Id.)

3. **DEFENDANT AGAINST WHOM NO CAUSE OF ACTION STATED.**—The joinder, as party defendant of one against whom no cause of action is stated does not deprive other defendants of the right to have the action tried in the county of their residence. (South v. French, 28.)

4. **WHEN SECTION 392, CODE OF CIVIL PROCEDURE, APPLICABLE.**—An action must be wholly local in its nature to require it to be brought in the county designated by section 392 of the Code of Civil Procedure. (Weyer v. Weyer, 765.)

See Divorce, 32, 33.

VERDICT. See Judgments, 14; Waters and Watercourses, 2.

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WAGE LAW.

1. **CONSTITUTIONALITY AS APPLIED TO INDIVIDUALS.**—The act of May 1, 1911 (Stats. 1911, p. 1268), providing for the payment of wages, and the amendment thereof, approved April 28, 1915 (Stats. 1915, p. 299), is not unconstitutional as applied to natural persons. (*Manford v. Singh*, 700.)
2. **DESIGN OF LAW—CONSTRUCTION OF.**—While the design of such wage law is to protect the employee and to promote the welfare of the community, without defeating that purpose it should be construed so as to hamper as little as possible the valuable right and privilege of making contracts. (*Id.*)

WAIVER. See Appeal, 33-35; Contracts, 25, 30, 37; Criminal Law, 18; Fraudulent Conveyances, 2; Judgments, 15; Pleading, 13; Sales, 3; Street Law, 6.

WAREHOUSEMEN.

1. **LIABILITY OF WAREHOUSEMAN—RIGHT TO LIMIT BY PROVISION IN RECEIPT.**—In view of the provisions of section 3 of the "Warehouse Receipts Act" (*Deering's Gen. Laws 1915*, p. 2022), a warehouseman, by the insertion of a provision in his warehouse receipt that goods are deposited "for account and at the risk of" the depositor, cannot relieve himself from the liability imposed by section 21 of the act, which provides that a warehouseman shall be liable for any loss or injury to goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise. (*Morse v. Imperial G. & W. Co.*, 574.)
2. **INCREASED LIABILITY BY CONTRACT.**—While a warehouseman cannot exempt himself from the liability thus imposed by law, he may by special contract assume liability for loss of goods due to any cause, thus making himself an insurer thereof. (*Id.*)
See Supplementary Proceedings, 2.

WATERS AND WATERCOURSES.

1. **NATURAL WASH—OBSTRUCTING BY EMBANKMENTS AND DIKES—DIVERTING FLOW UPON LAND OF ANOTHER—ACTION FOR DAMAGES AND FOR INJUNCTION TO ABATE NUISANCE—JURY TRIAL.**—In an action for damages and for an injunction to abate a nuisance consisting of the maintenance of embankments and dikes by means of which the waters of a natural wash are obstructed and diverted, and the flow precipitated upon plaintiff's land, the parties are entitled as of right to a trial by jury of the issue as to damages. (*Franklin v. Southern Pacific Co.*, 31.)

WATERS AND WATERCOURSES (Continued).

2. **GENERAL VERDICT—EFFECT OF.**—Where such trial is had, the general verdict of the jury is binding upon the court, which has no power to vacate it except upon motion for new trial. (Id.)
3. **STATUTE OF LIMITATIONS, HOW PLEADED.**—In such an action an allegation in the answer that the improvements, embankments, etc., described in plaintiff's complaint, which it is alleged caused a diversion of the flow of water, had been erected "for more than five years prior to the institution of the action," sufficiently pleaded the statute of limitations. (Id.)
4. **OMISSION OF FINDING ON STATUTE OF LIMITATIONS.**—In such case, in ruling on defendants' motion for a nonsuit, the court erred in holding that the statute of limitations had not been sufficiently pleaded, and consequently erred in making no finding upon the issue tendered upon that statute. (Id.)

See Easements, 3.

WATERS AND WATER RIGHTS.

1. **USE OF WATER OF PARTICULAR STREAM—RIGHT OF COMPANY TO SUPPLY OTHER WATER.**—Where a property owner has no interest in the water of a particular stream from which the company furnishing her with water obtains its supply, she has no right to complain because such company sells all or any part of the water from which it is supplied her at any particular time, so long as it keeps in its pipes other water of fair quality and reasonable in quantity and pressure. (*Marr v. City of Glendale*, 748.)
2. **RIGHT OF WATER COMPANY TO ABANDON BUSINESS.**—Where such property owner was without any right of use in the water itself, even though the company had abandoned its business of supplying property owners with water and thus left its supply pipes empty, she could not have complained. (Id.)
3. **SUPPLYING OF WATER BY MUNICIPALITY—RIGHT TO COMPEL EXTENSION OF SYSTEM.**—From the fact that a municipality may engage in the business of supplying its inhabitants with water, it does not follow that every property owner or taxpayer, however remote his land may be situated from the distributing system, can by mandate compel such extension of the system as will make available to him that supply. It would be most unreasonable to hold that a municipality must establish an expensive system of distributing lines to reach isolated inhabitants or to supply one or two persons living in places remote from well-settled districts; and more particularly is this true where the person asking for such service already has at his door water in sufficient quantity and of reasonably good quality. (Id.)

WORKMEN'S COMPENSATION ACT.

1. **AWARD OF COMPENSATION FOR INJURIES—SUBSEQUENT ACTION AGAINST NEGLIGENT PARTY—EMPLOYER AND INSURANCE CARRIER REFUSING TO JOIN—EMPLOYEE SUING ALONE.**—After an award by the Industrial Accident Commission to an injured employee, and payment by the employer's insurance carrier, the injured employee may maintain an action alone against the party whose negligence caused the injury, where the employer and his insurance carrier refuse to join as plaintiffs by making them parties defendant. (*Ondanck v. Southern Pacific Co.*, 38.)
2. **AWARD TO INJURED EMPLOYEE—SUBSEQUENT ACTION BY EMPLOYEE AGAINST TORT-FEASOR—PARTIES—JOINDER OF EMPLOYEE WITH EMPLOYER OR INSURANCE CARRIER.**—An injured employee, after having made claim and received an award against his employer under the Workmen's Compensation Act, may join as party plaintiff with his employer or the latter's insurance carrier in a suit against a third party whose tort caused the injuries complained of. (*Hall v. Southern Pacific Co.*, 39.)
3. **EMPLOYER REFUSING TO JOIN AS PLAINTIFF—INJURED EMPLOYEE SUING ALONE.**—Upon the refusal of the employer to join as plaintiff in such a suit, the injured employee may sue alone, by joining the employer as a defendant. (*Id.*)
4. **PROSPECTIVE EMPLOYMENT—INJURY BEFORE ACCEPTANCE OF PROFFERED SERVICES—RELATION OF PARTIES.**—A finding of the Industrial Accident Commission that a certain person was an employee of the California Highway Commission at the time he was injured and that the injury arose out of and in the course of his employment as such employee, is not supported by the evidence, when the uncontroverted facts show that such person was injured while on his way to the place of prospective employment where he was to offer his services to the foreman in charge, who was the only person who had the right to employ labor, and that at the time of the injury he had not yet reported to such foreman and there had been no word or act on the part of such foreman manifesting an acceptance of his proffered service. (*Highway Com. v. Industrial Acc. Com.*, 465.)
5. **PROVIDING OF MEANS OF CONVEYANCE—IMMATERIAL FACTOR.**—The fact that such injured person, instead of providing his own means of conveyance and cost of transportation, availed himself of the proffered offer of the California Highway Commission to advance the cost thereof is an immaterial factor in the consideration of the question as to whether the relation of employer and employee existed. (*Id.*)
6. **OMISSION TO USE GOGGLES—DISOBEDIENCE OF RULES AND INSTRUCTIONS—WILLFUL MISCONDUCT—REDUCTION OF COMPENSATION.**—

WORKMEN'S COMPENSATION ACT (Continued).

Where a machinist's helper engaged by a railroad company voluntarily and intentionally omits to obtain and use goggles, contrary to rules of which he has knowledge, and contrary to specific instructions, all of which were laid down for his protection, because goggles are "in his way," he preferring to take the chance of personal injury, he is guilty of willful misconduct, and under section 6, subdivision 4, of the Workmen's Compensation Act of 1917, the compensation otherwise recoverable by him should be reduced one-half. (McAdoo v. Industrial Acc. Com., 570.)

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